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40534

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

NICK ANTON,

Appellee.

216/5
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

308 I.A. 313¹
OPINION ON REHEARING.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

After filing our opinion in this cause, which was here consolidated with cause Number 40535, defendant presented a petition for rehearing. Subsequently other counsel moved to intervene as amicus curiae. The petition for rehearing was allowed, counsel had leave to intervene as amicus curiae and to file their separate brief. The State thereupon filed its answer to the petition for rehearing.

The cause originally came to us upon a common law record showing that July 6, 1925, defendant was tried and convicted in the Municipal court as the keeper of a house of ill fame and was fined \$5 and costs; that both the fine and costs were paid by him; that subsequently, September 28, 1925, he was again tried and convicted on information in the Municipal court as a keeper of a house of ill fame, and was sentenced to the house of correction for thirty days, which sentence he served in accordance with the court's order; that some twelve years after these two convictions he filed a petition in the nature of a writ of error coram nobis in each case. The petitions were identical and alleged in substance that when arraigned on the charges in the Municipal court in 1925 he entered pleas of "not guilty"; that "fearing the consequences of conviction [petitioner] attempted to prevail upon one Eugene Robinson to appear as a witness on his behalf, but was informed that the said Eugene Robinson had been threatened with physical injury and harm in the event he failed to leave the jurisdiction of this court until such time as the case

THE STATE OF ALABAMA
SHERIFF

IN SENATE
JANUARY 10, 1907

REPORT

1896-1906

IN SENATE
JANUARY 10, 1907
REPORT
OF THE
SHERIFF
OF THE
STATE OF ALABAMA
FOR THE
TERM
ENDING
DECEMBER
31, 1906

THE SHERIFF OF THE STATE OF ALABAMA
FOR THE TERM ENDING DECEMBER 31, 1906
REPORT
OF THE
SHERIFF
OF THE
STATE OF ALABAMA
FOR THE
TERM
ENDING
DECEMBER
31, 1906

was disposed of *** and that said Robinson was coerced into leaving the jurisdiction of the court and did not appear as a witness in behalf of petitioner, and as a result thereof the finding of guilty was entered against this petitioner *** and that by reason of the fear instilled in the mind of said witness by threats of violence and his consequent failure to testify, this petitioner was by duress and not by reason of any negligence or carelessness on his own behalf, deprived of his defense to the court, *** and that the testimony of said witness, Eugene Robinson, if given at the trial of the above cause, would have completely exonerated the petitioner of any guilt, *** and that if the facts were made known to the said trial judge by this witness at the time of said trial, this would have prevented the judgment of guilty from being entered in said cause." Defendant further alleged that without fault or negligence on his part he had been continually, since the time of the conviction, under disability from presenting the aforementioned facts of his defense by reason of the continued operation of duress upon his witness, Robinson, and Robinson's absence from the jurisdiction of the court, but that these disabilities had terminated by reason of the return of Robinson, whose affidavit concerning the facts was attached to the petition as an exhibit; and petitioner sought by reason of the allegations contained in the petition and Robinson's affidavit to avoid the effect of the five year statutory provision for filing writs of this nature.

The State filed motions to dismiss each of the petitions, alleging in substance the bar of the statute of limitations; that defendant was not prevented from presenting the facts alleged in his petition to the court at the time of the trial, either by duress, fraud, excusable mistake or ignorance; that the petitions did not state facts, but were conclusions; that the facts alleged by petitioner were known to him at the time of the trials, but through his own carelessness or negligence were not presented to

not disposed of the said said evidence and returned into custody
the jurisdiction of the court and did not appear as a witness in
favor of defendant, and as a result thereof the finding of guilty
was entered against this defendant and the court of record of the
fact involved in the trial of this defendant is hereby affirmed
and its consequent finding is hereby affirmed, this defendant was by reason
and not by reason of any negligence or carelessness on his own
behalf, deprived of his defense in the court, and that the
injustice of this finding, as well as the finding of the trial
of the above case, would have been avoided had the defendant
of the trial, and that if the facts were known to the court
before by this finding as the law of this state, this finding
was prevented the finding of guilty from being entered in this
case. " Defendant further alleges that without fault or negligence
on his part he has been convicted, since the time of the conviction
that, under disability from receiving the aforementioned benefit of
his defense by reason of the defendant's operation of various affairs
of the defendant, and defendant's absence from the jurisdiction of
the court, that said cause shall be set aside by reason of
the taking of evidence, and a writ shall be granted the court and
attached to the petition in its behalf; and defendant would by
reason of the allegations contained in the petition and defendant's
affidavit be made the effect of the five years statute provision
the filing with of this matter.

The state first motion to dismiss with of the petition,
alleges in substance the law of the state of Mississippi that
defendant was not privileged from prosecution the facts alleged in
his petition as the court at the time of the trial acted by
reason, through careless mistake or negligence that the defendant
did not appear before the court and that the facts alleged
by defendant were known to him at the time of the trial, but
through his negligence or negligence was not privileged to

the court; that the alleged facts were insufficient to give the court jurisdiction in either of these cases; and that no action was taken within the statutory period of five years.

We held in our original opinion that under the plain language of the statute the petitioner himself must be under duress from threats made against him personally, and that since there were no allegations in either petition that anyone had threatened Anton, and that since upon the showing made he had been at liberty at any time within the five years allowed by the statute to bring these proceedings and seek a new trial, but had failed to do so, the statute became operative against him. We also held that the essential allegations of the petitions were mere conclusions of the petitioner; that no averments were made as to what Robinson would have testified to as supporting the defense which Anton then interposed in both cases, and that there was no certainty that the court would have believed Robinson's testimony if he had testified. We further found that from the allegations of the petitions it appeared that Robinson was in court, and, presumably, if Anton had called the court's attention to the fact that he was hesitant or had refused to testify because of threats made by third persons, the court could have called Robinson as its own witness and elicited from him such facts as might have enlightened the court upon the merits of the causes on hearing. We were also of opinion that the allegations of the petitions did not bring Anton within the class of cases contemplated to afford relief by motion in the nature of the writ of error coram nobis, and that any rights which Anton may have had were effectually barred by the statute.

Two decisions, not heretofore cited, are called to our attention by the amicus curiae, and argued extensively. In one of these, State v. Killigrew, 202 Ind. 397, 174 N. E. 808, the relator filed his verified complaint asking that a writ of mandate issue out of the Supreme Court of Indiana commanding and directing the defendants in their official capacities respectively to allow him to file in the

Criminal court of Lake county in that state his verified petition for a writ of error coram nobis. The writ of mandate was issued by the Supreme court and made permanent without opinion. Subsequently defendants filed a petition for a rehearing, insisting that the Supreme court had erred in holding that relator was entitled to file his petition for a writ of error coram nobis in the Criminal court of Lake county, and in making the writ of mandate permanent. This raised questions as to the practice applicable to petitions of that character in Indiana and also as to collateral questions affecting the granting of the writ, especially as relating to a new trial, and the Supreme Court of Indiana was of opinion that in view of the importance of clarifying these points the decision on the petition for rehearing should be accompanied by an opinion. As a result of the proceedings, the court permitted a judgment and sentence which had been fully executed to be expunged from the record under a petition for a writ of error coram nobis and a new trial to be granted to the defendant. The obvious purpose of the proceeding was to clear defendant's name and reputation by reason of the sentence that had been entered against him, so as to prevent his deportation by the federal government. The amicus curiae concede that the common law applicable to a writ of error coram nobis prevailed in Indiana when the Killigrew case was decided, and that under the common law the granting of a writ of error coram nobis was not barred by the statute of limitations. The law in Illinois is otherwise. The statute in this state, as set forth in our original opinion, abolished the writ of error coram nobis, and provides in lieu thereof that all errors in fact committed in the proceedings of any court of record may be corrected by the court "upon motion in writing, made at any time within five years after the rendition of final judgment in the case." The allegations by which Anton sought to avoid the five year statutory limitation were held by us to have been insufficient and obnoxious to the motion made by the state to strike the petition. There is nothing in the Indiana

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Original Court of Lake County in that state his written position
for a writ of error coram vobis. The writ of error was issued by
the Supreme Court and made permanent without appeal, subsequently
the Supreme Court filed a petition for a writ of error, including that law
the Supreme Court had issued in holding that certain law violated by the
his position for a writ of error coram vobis in the original writ
of Lake County, and in making the writ of error permanent. This
writ of error was issued to the Supreme Court applicable to questions of law
thereover in Indiana and also in the original questions affecting
the granting of the writ, especially in relation to a writ of error, and
the Supreme Court of Indiana was of opinion that in view of the
importance of clarifying these points now pending on the petition
for rehearing should be accompanied by an opinion, as a result of
the proceedings, the Court rendered a judgment and sentence which
had been fully executed to be extended from the second until a writ
for a writ of error coram vobis and a new writ to be granted to the
defendant. The obvious purpose of the proceeding was to allow the
Court's time and reputation by reason of the sentence that had been
entered against him, to be to prevent the repetition by the Federal
Government. The United States Commission that the common law applicable
to a writ of error coram vobis provided in Indiana when the United States
case was decided, and that under the common law the granting of a writ
of error coram vobis was not barred by the statute of limitations. It
was in Illinois is established. The statute in this State, as set out
in our original opinion, abolished the writ of error coram vobis and
provided in like manner that all errors in fact committed in the two
instances of any court of record may be corrected by the Court upon
motion in writing, and as any error within five years after the
 rendition of final judgment in the case. The allegations by which
action sought to annul the five year statute legislation were held
by us to have been insufficient and erroneous in fact made by
the State to obtain the position. There is nothing in the Indiana

decision to indicate that the petition there filed was considered by the court to be insufficient or defective, whereas in the case at bar we originally held that Anton's petition was clearly insufficient and that the court should have allowed the state's motion to strike and we adhere to that conclusion.

Likewise, in the Massachusetts case Murphy v. Commonwealth, 174 Mass. 369, 54 N. E. 860, also cited by the amicus curiae, the court permitted a judgment and sentence which had been fully executed to be expunged from the record under a petition for a writ of error coram nobis and a new trial to be granted to defendant. For aught that appears in that decision, we may well assume that the petition for a writ of error coram nobis made a sufficient showing and justified a retrial. Under the conclusions reached by us in our original opinion neither of these decisions would affect the result attained.

Upon due and careful consideration of the petition for rehearing and the additional suggestions contained in the brief filed by the amicus curiae, we adhere to our original opinion holding that the allegations of the petition did not make out a case contemplated by motion in the nature of a writ of error coram nobis and that the action was barred by the statute of limitations. The judgment of the Municipal court is reversed.

JUDGMENT OF THE MUNICIPAL COURT
REVERSED.

Scanlan and Sullivan, JJ., concur.

client and that the client would not be able to pay the balance of the bill. The client was advised that the balance of the bill was \$100.00 and that the client was to pay the balance of the bill. The client was advised that the balance of the bill was \$100.00 and that the client was to pay the balance of the bill.

[illegible]

CONFIDENTIAL

40534

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

NICK ANTON,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

308 I.A. 313²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On July 6, 1925, Nick Anton was tried and convicted in the Municipal court as the keeper of a house of ill fame, a place for the purpose of prostitution, fornication and lewdness, and was fined \$5 and costs. Both the fine and costs were paid by him. Subsequently, September 28, 1925, he was again tried and convicted on information in the Municipal court as a keeper of a house of ill fame, and was sentenced to the House of Correction for 30 days, which sentence he served in accordance with the court's order. Some twelve years after these two convictions, he filed a petition in the nature of a writ of error coram nobis in each case. The petitions were identical and alleged in substance that when arraigned on the charges in the Municipal court in 1925 he entered pleas of not guilty; that "fearing the consequences of conviction (petitioner) attempted to prevail upon one Eugene Robinson to appear as a witness on his behalf, but was informed that the said Eugene Robinson had been threatened with physical injury and harm in the event he failed to leave the jurisdiction of this court until such time as the case was disposed of * * * and that said Robinson was coerced into leaving the jurisdiction of the court and did not appear as a witness in behalf of petitioner, and as a result thereof

PROBATION DEPARTMENT
CHICAGO, ILLINOIS
JULY 10, 1935

RECEIVED
JULY 10, 1935

Appeals

308 I.A. 313

RE. JAMES EARL RAYMOND, THE ORIGIN OF THE COURT.

On July 6, 1935, Nick Amos was tried and convicted in

the Municipal Court as the keeper of a house of ill fame, a

place for the purpose of prostitution, fornication and lewdness,

and was fined \$5 and costs. Both the fine and costs were paid by

him. Subsequently, September 20, 1935, he was again tried and

convicted on information in the Municipal Court as a keeper of a

house of ill fame, and was sentenced to the House of Correction

for 30 days, which sentence he served in accordance with the

court's order. Some twelve years after these two convictions,

he filed a petition in the nature of a writ of error claiming

in each case. The petitions were identical and alleged in substance

that when arraigned on the charges in the Municipal Court in 1935 he

entered pleas of not guilty; that "during the proceedings of con-

viction (petitioner) attempted to prevail upon one James Robinson

to appear as a witness on his behalf, but was informed that the said

James Robinson had been threatened with physical injury and was

in the event he failed to give the jurisdiction of this court until

such time as the case was disposed of. It was said that Robinson

was coerced into leaving the jurisdiction of the court and did not

appear as a witness in behalf of petitioner, and as a result thereof

the finding of guilty was entered against this petitioner * * * and that by reason of the fear instilled in the mind of said witness by threats of violence and his consequent failure to testify, this petitioner was by duress and not by reason of any negligence or carelessness on his own behalf, deprived of his defense to the court, * * * and that the testimony of said witness, Eugene Robinson, if given at the trial of the above cause, would have completely exonerated the petitioner of any guilt, * * * and that if the facts were made known to the said trial judge by this witness at the time of said trial, this would have prevented the judgment of guilty from being entered in said cause;" that he had a meritorious defense to the charges made against him, and that without fault or negligence on his part he had been continually, since the time of said conviction, under disability from presenting the aforementioned facts of his defense by reason of continued operation of duress upon said witness and his absence from the jurisdiction of the court, but that these disabilities have now terminated by reason of the return of Eugene Robinson, whose affidavit concerning the facts was attached to the petition as an exhibit; and petitioner sought by reason of the allegations contained in the petition, and Robinson's affidavit, to avoid the effect of the five year statutory provision for filing writs of this nature.

The State filed motions to dismiss each of the petitions, alleging in substance the bar of the statute of limitations; that defendant was not prevented from presenting the facts alleged in his petition to the court at the time of the trial, either by duress, fraud, excusable mistake or ignorance; that the petitions did not state facts, but mere conclusions; that the facts alleged by petitioner were known to him at the time of the trials, but through his own carelessness or negligence were not presented to the court; that the alleged facts were insufficient to give the court jurisdiction

in either of these cases; and that no action was taken within the statutory period of five years.

After numerous continuances or postponements of the cases, they were called up for hearing December 1, 1938, and amended petitions, identical with the originals except that they contained an amplification of the facts alleged, were filed by Anton. When the matter was finally heard by the court orders were entered that the judgment of guilty be vacated, set aside and expunged and that a new trial be granted. After hearing, defendant was found not guilty of the offense charged in the informations and he was accordingly discharged. The State appealed from the orders entered in both cases, and during the pendency of the appeals this case, General No. 40534, was consolidated by an order here entered with cause General No. 40535, and but one set of briefs was filed by the parties.

It is difficult to understand the theory upon which a defendant, after paying a fine imposed upon him by the court and serving his full sentence in the House of Correction, as ordered by the court, may, twelve years thereafter, seek and obtain a new trial. Petitioner Anton's petitions were predicated upon the provisions of chapter 110, paragraph 196, section 72, Illinois Revised Statutes, 1937, which reads as follows: "The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, non compos mentis or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years." (Italics ours.)

in either of these cases; and that no action was taken within the statutory period of five years.

After numerous continuances or postponements of the case, they were called up for hearing December 1, 1938, and amended petitions, identical with the original except that they contained an amplification of the facts alleged, were filed by them. Then the matter was finally heard by the court en banc and entered that the judgment of guilty be vacated, set aside and expunged and that a new trial be granted. After hearing, defendant was found not guilty of the offense charged in the information and he was accordingly discharged. The State appealed from the order entered in both cases, and during the pendency of the appeals this case, No. 40334, was consolidated by an order here entered with case No. 40335, and but one set of briefs was filed by the parties.

It is difficult to understand the theory upon which a delay in, after giving a time imposed upon him by the court and serving his full sentence in the House of Correction, he should be the same may, twelve years thereafter, seek and obtain a new trial. Defendant's petition was granted upon the provisions of Chapter 110, paragraph 126, section 73, Illinois Civil Statutes, 1937, which reads as follows: "The writ of error coram nobis is not abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion or writ, made at any time within five years after the rendition of final judgment in the case, upon responsible notice. and the person entitled to make such motion shall be an infant, non compos mentis or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years." (Ill. Civ. Stat.)

Petitioner sought to avoid the five year statutory limitation by alleging that his witness, Robinson, was under duress at the time of his trials in 1925, and that the duress continued by reason of Robinson's absence from the jurisdiction until his return within a short time before the petitions were filed. However, the words of the statute are plain and admit of but one construction, namely, that the petitioner himself must be under duress from threats made against him personally. There are no allegations in either petition that anyone threatened Anton, and so far as these petitions show he was at liberty at any time within the five years allowed by statute to bring these proceedings and seek a new trial. Moreover, without analyzing the allegations of the petitions in detail, it clearly appears that most of the allegations are mere conclusions of petitioner. He alleges, for instance, that the testimony of Robinson would have exonerated him. That allegation is a pure conclusion, because he does not allege what Robinson would have testified to as supporting the defense which Anton then interposed in both cases, nor is there any certainty that the court would have believed Robinson's testimony if he had testified. From the allegations of the petitions it appears that Robinson was in court, and presumably, if Anton had called the court's attention to the fact that he was hesitant or had refused to testify because of threats made by third persons the court could have called Robinson as its own witness and elicited from him such facts as might have enlightened the court upon the merits of the causes on hearing. If a defendant, after paying his fine and serving his sentence may wait twelve years before coming into court, and then claim that he is entitled to a new trial because of duress by persons unknown practiced upon one of his witnesses, no record would be safe in any court, and that, perhaps is the reason for the statutory provision that the defense of duress must be personal to the party injured by the judgment. The courts in People v.

Petitioner sought to avoid the five year statutory limitation by alleging that his witness, Robinson, was under duress at the time of his trials in 1957, and that the issues contained by reason of Robinson's absence from the jurisdiction until his return within a short time before the petition were filed. However, the words of the statute are plain and admit of but one construction, namely, that the petitioner himself must be under duress from the time he made against him personally. There are no allegations in either petition that any one threatened, coerced, or so far as these petitions show he was at liberty at any time within the five years allowed by the statute to bring these proceedings and seek a new trial. Moreover, without analyzing the allegations of the petition in detail, it clearly appears that most of the allegations are mere conclusions of fact - namely, the alleged, for instance, that the testimony of Robinson would have exonerated him. That allegation is a pure conclusion, because he does not allege that Robinson would have testified to an exonerating the defense which when introduced in both cases, nor is there any statement that the court would have believed Robinson's testimony if he had testified. From the allegations of the petition it appears that Robinson was in court, and presumably, at least he had called the court's attention to the fact that he was not testifying and had refused to testify because of threats made by third persons. The court could have called Robinson to its own witness and elicited from him such facts as might have enabled the court upon the merits of the causes on record. It is defendant, after paying his fine and serving his sentence may well have years before coming into court, and then claim that he is entitled to a new trial because of threats by persons unknown introduced upon one of his witnesses, no reason could be set in any court, and that, because of the reason for the statutory provision that the defense of duress must be personal to the party injured by the judgment. The court in People v.

Nakielny, 279 Ill. App. 387; Hintz v. Hintz, 222 Ill. 248; and People v. McAldon, 141 Ill. App. 27, have placed the construction contended for by the State upon the provisions of the statute hereinbefore quoted.

Although some testimony was taken before the court after the motion to dismiss was denied, no bill of exceptions was preserved in either case. We think, however, that the court should have dismissed the petition upon the State's motion, without a hearing, because the petition was defective for many or all the reasons assigned by the State. The statute of limitations had clearly run, and defendant had paid his fine and complied with the sentence, and there was no reason why a new trial should have been granted twelve years after the cases were heard. Therefore, the judgment of the Municipal court in case No. 40534, vacating, setting aside and expunging the finding of guilty and granting defendant a new trial and finding him not guilty and discharging him, should be reversed, and it is so ordered.

JUDGMENT REVERSED.

Burke, P. J., and Sullivan, J., concur.

40535

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

NICK ANTON,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

308 I.A. 314

OPINION ON REHEARING.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is a companion case to General No. 40534, in which a petition for rehearing was granted at the instance of defendant and counsel for amicus curiae. The same proceedings that were had in 40534 were followed in this case with the same result.

What we said in our opinion on rehearing in case No. 40534, filed this day concurrently herewith, is precisely applicable to this proceeding, and for the same reasons we adhere to our original opinion holding that the judgment of the Municipal court should be reversed.

JUDGMENT OF THE MUNICIPAL
COURT REVERSED.

Scanlan and Sullivan, JJ., concur.

40532

RECORDS OF THE STATE OF ILLINOIS

Appellate

APPELLATE COURT RECORDS

RECORD OF DECISIONS

SIXTH JUDGE

WILLIAM

308 I.A. 314

OFFICE OF THE CLERK

IN RE: PETITION FOR WRIT OF HABEAS CORPUS

This is a companion case to No. 40534, in which a petition for reviewing was granted at the instance of defendant and counsel for said party. The same proceedings that were had in 40534 were followed in this case with the same result.

That we said in our opinion on review in case No. 40534, filed this day concurrently herewith, is precisely applicable to this proceeding, and for the same reasons we adhere to our original opinion which that the judgment of the appellate court should be reversed.

ORDERED BY THE COURT
THAT THE JUDGMENT BE REVERSED.

RECORDED AND INDEXED, 11, 1904.

40533

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

NICK ANTON

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

308 I.A. 314²

MR. JUSTICE FRIMM DELIVERED THE OPINION OF THE COURT.

This cause was consolidated upon appeal with case No. 40534, in which an opinion has this day been filed. The petition of Nick Anton filed in this proceeding is substantially identical with the one filed in No. 40534, and the findings and conclusions reached in No. 40534 are controlling in this cause. For the reasons given in the opinion in No. 40534, the order of the Municipal court vacating, setting aside and expunging the finding of guilty and granting defendant a new trial and finding him not guilty and discharging him, is reversed.

ORDER REVERSED.

Burke, P. J., and Sullivan, J., concur.

415. A. J. C. 08

[illegible]

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in
the year of our Lord one thousand nine hundred and forty,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 314³

BE IT REMEMBERED, that afterwards, to-wit: On JUN 28 1940
the Opinion of the Court was filed in the Clerk's Office of
said Court, in the words and figures following, viz:

GEN. NO. 9523

AGENDA NO. 3.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1940.

RICHARD P. HUNGER and
WILLIAM CASTLE,

Appellees,

vs.

APPEAL FROM CIRCUIT COURT

FRANK ALAN JOHNSON and
ESTER B. JOHNSON, his wife,

LAKE COUNTY.

Appellants.

HUTTMAN - J.

This is an action to enforce a building line restriction. Angenettie Ostrander owned a tract of ground in the village of Fox Lake. Early in 1921, she decided to subdivide this land into lots. Pursuant thereto, she had the tract surveyed and a plat made. It is alleged that the plat was duly certified to by the surveyor, filed with and accepted by the Village Board of Fox Lake. It is further alleged by appellees in their complaint that the said landowner made certain building line restrictions with reference to the lots in the subdivision, pursuant to a general plan of development and improvement; that a building line restriction for lots six and seven was fixed and incorporated in the deed of conveyance therefor, from the said Angenettie Ostrander to appellants herein. It is further alleged that building line restrictions pursuant to the plan of the owner for the development and improvement of this subdivision, were incorporated in all of the deeds to the various lots which she sold. It further appears that all of the lots have been sold by the original owner.

IN THE MATTER OF THE

STATE OF NEW YORK

IN SENATE

January 1, 1964

REPORT

OF THE

COMMISSION

ON THE

ADMINISTRATIVE REORGANIZATION OF THE STATE

OF NEW YORK

FOR THE YEAR 1963

AND

RECOMMENDATIONS FOR THE FUTURE

OF THE STATE

OF NEW YORK

FOR THE YEAR 1964

AND

RECOMMENDATIONS FOR THE FUTURE

OF THE STATE

OF NEW YORK

FOR THE YEAR 1965

AND

RECOMMENDATIONS FOR THE FUTURE

OF THE STATE

Appellants in August, 1938, commenced the construction of a building on lot six. Their deed to lot six and seven from the said Angenettie Ostrander, provided that all buildings must front to the south and that no building was to be erected closer than fifteen feet to the south line of said lots. Appellants started the construction of this building with the apparent intention of having it even with the south line of said lot. The evidence of the surveyor is to the effect that the building extends about three inches beyond the south property line. Appellees caused notice to be served on appellants on August 19, that unless they desisted from their design to so construct this building even with the south line or front of said lot, contrary to the building restriction, that they would take steps to apply for an injunction restraining them from so doing, and to require them to remove so much of the building as they might have then constructed, which violated the building restriction as fixed in the deed. Thereafter, appellees filed their complaint. A temporary injunction issued, which was later made permanent, and the appellants were ordered to remove that portion of the building which violated the building restriction, within ninety days of the decree. It is from this decree appellants bring this appeal.

The facts as thus far stated, do not appear to be in dispute. Appellants' deed to the lot contained the building restriction. The evidence and the photographs disclose that the structure extends to the south line or front property line of the lot and appears to be even with the sidewalk line.

Appellants argue that restrictions on building lines must be part of the general plan or scheme for the development and improvement

of the property, urging in this respect that the building line restrictions for some of the lots were ten feet instead of fifteen. The owner had the right to sell her property upon such terms and conditions as she deemed proper, and when same were accepted by the grantee and were not objectionable in law, the owner's motive or method for formulating her plan or design for the improvement and development of the subdivision, should not be too strictly construed. Appellants next argue that the building restriction relative to their lot is personal to the grantor, and that the adjoining property owners cannot avail themselves of such covenant. They next argue that restrictions of this character are not favored in law and that all doubts will be resolved against such restrictions. And finally, that appellees have waived any rights to enforce the restriction against them, because they have acquiesced in the violation of such restriction with respect to other lots in the subdivision,

There are two commonly employed methods of creating restrictions on the use of property such as is involved in this case. One is by express covenants of restriction contained in the deed, and the other is by the recorded plat of the subdivision. The two common objects of a building line restriction, are to secure unobstructed light, air and vision for the lots for whose benefit the restriction is created, and to secure uniformity in the location of the building improvements with respect to the street line, thus promoting a general plan of improvement and development. *O'Gallagher v. Lockhart*, 263 Ill. 489; *Brandenberg, v. Lager*, 272 Ill. 622. Where building line restrictions are inserted in the deeds of conveyance made by the proprietor, they are considered as covenants running with the land, and

it is not necessary, in order to justify the interposition of a court of chancery to prevent the violation of such a provision, that the right claimed be absolutely necessary to the enjoyment of the estate granted. It is sufficient if it is a benefit, and a party assuming to violate such a restriction, may be enjoined from so doing by any person holding title to a lot or lots within the subdivision, who has a right and interest in the observance of such restriction. *Brandenberg v. Lager, supra*.

Where there is a general plan or scheme for the benefit of the purchasers, such plan will be enforced upon the grantees where the lots are sold and an agreement made with each purchaser as to the building line, where it appears such agreement is intended for the common benefit of all purchasers. It is generally considered under such circumstances, that each party interested may enforce the restrictive agreement against each of the others. The question presented in such cases is whether the party shall be permitted to use the land in a manner inconsistent with the contract entered into by the vendor and with notice of which he purchased. *Wiegman v. Kusel*, 270 Ill. 520.

There is no claim in this case that the property involved and the surrounding property has so changed in character, environment and use as to render it undesirable and unprofitable, if the restriction be enforced. The character, condition and use of the property appears to be the same as when subdivided, that is, merely a collection of lots along a lake, apparently intended for use and occupancy during the season of the year common to all such property.

Appellants urge that appellees have waived any right to insist upon enforcement of the building line restriction because they have acquiesced in a violation of such restriction by the owner of lots

one and two. The subdivision extends westward from the lake shore. Lots one and two are located at the east end of the addition and border the lake front. They are used for business purposes, namely, as a store, gasoline supply station, fishing bait, and the sale of such other commodities as might be expected at a place of this character. We are not of the opinion that this serves to preclude appellees from insisting upon the observance of the restriction by appellants with respect to a lot located next to one of their lots. *O'Neill v. Wolf*, 338 Ill. 506; *O'Gallagher v. Lockhart*, *supra.*; *Bacon v. Sandberg*, 179 Mass. 396; 60 N. E. 936.

It appears to have been the manifest intention of the owner to bring about the development and improvement of her subdivision according to a plan which would bring the most enjoyment and comfort to those who purchased lots therein for the purpose of erecting cottages. We find nothing in the record to deprive appellees of their right to exercise such benefit. The decree of the circuit court is therefore affirmed. The court finds that the additional abstract filed by appellees was proper and necessary, and cost thereof is ordered taxed against appellants.

Decree affirmed.

• 200 • • 200 • • 200 • • 200 • • 200 •

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of October, in
the year of our Lord one thousand nine hundred and forty, within
and for the Second District of the State of Illinois:

Present -- The HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 315'

BE IT REMEMBERED, that afterwards, to-wit: On DEC 19 1904
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT.

OCTOBER TERM, A. D. 1940.

LOUISE SWANSON,

Appellant,

vs.

ROCK ISLAND STOVE COMPANY,
a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT
ROCK ISLAND COUNTY.

HUFFMAN - J.

This suit originated upon complaint filed by appellant asking to restrain appellee from removing a hot air furnace which had been installed in a house owned and occupied by appellant and her husband. By her complaint she alleged that she was the owner of the premises; that appellee was threatening to remove the hot air furnace which was installed therein; that the furnace was a part of the real estate; and that appellee had no right to remove it.

Appellee replied to the complaint and filed its counterclaim, wherein it set up that in December, 1931, it entered into a conditional sales contract with appellee's husband for the installation of this furnace, and that pursuant to such contract, the furnace was installed; that it was then of the value of \$232, and that such was the sale price thereof; that \$20 was paid upon the purchase price on December 8, 1931, and \$10 paid on February 8, 1932; that although often requested and although innumerable statements and bills were mailed to appellee and her husband, no further

payments were made; that because of such failure to pay for the furnace, appellant through its agents, went to the premises of appellee on March 4, 1938, and demanded possession and return of the furnace in accordance with the conditional sales contract; that appellee refused to permit them to remove the furnace, whereupon appellee in its counterclaim demanded judgment for the amount claimed due.

It appears that a conditional sales contract was entered into during the month of December, 1931, between appellee and Olaf Swanson, husband of appellant, either in person or by and through J. G. Swanson, with power of attorney. The contract described the premises by street number and also contained a description of the house with respect to the number of rooms, as well as a description of the heating plant to be installed. The total purchase price was stated at \$232. The installment payments were set out in detail, together with the dates they were to become due. By the terms of the sales contract, it was provided that the title to the furnace and all equipment and appliances, was to remain in appellee until the full purchase price was paid. Appellee in its counterclaim, sought to recover damages for the conversion of the furnace by appellant.

The case was heard by the court entirely upon stipulation of the parties. The stipulation discloses that the premises are improved with a five room house occupied by appellant and her husband. It also appears that in May, 1930, appellant and her husband entered into a contract with Louis M. Karr and wife for the sale of the premises; that Karr and wife took possession thereof and soon thereafter had appellee install the furnace in question; that at such time, appellant and her husband were in California; that Mr. J. G. Swanson was looking after their business in general and looking after the property in question; that soon after Karr and wife took possession of the premises under their purchase contract, they abandoned same and delivered up possession thereof to appellant

payments were made; that because of such failure to pay for the
insurance, applicant was not insured, and as the insurance
expired on April 1, 1933, and general position was not
the insured in connection with the insurance policy.
that applicant failed to pay for the insurance, and
upon expiration in its connection with the insurance
expired the.

It appears that a conditional sales contract was entered into
during the month of October, 1931, between applicant and the
and, but not of applicant, which in payment of the balance of the
amount, with interest of interest. The contract provided for payment
by direct payment and also provided for a description of the same with
reference to the number of rooms, as well as a description of the same
and plans to be furnished. The conditional sales contract was dated on
April. The insurance policy was not in effect, and
with the date was not in effect. The date of the sale
contract, it was provided that the title to the house was not
assigned and assigned, and the same in writing in all the
purchase price was paid. Applicant is the owner of the house, and
recover same for the completion of the contract by applicant.

The case was heard by the court official court with reference to
the matter. The court official decided that the question was the
proper with the time when the contract was made and was not
It also appears that in 1931, applicant and her husband entered
into a contract with the title. The contract was not in effect
proceeds from the sale and was not in effect. The contract was not
after has been made in the contract in payment; and as soon
time, applicant and her husband were in California; and as to
contract was made with the title. The contract was not in effect
after the property in California; and as to the title was not
proceeds of the contract with the title. The contract was not in effect
applicant was not in California; and as to the title was not

through her agent, Mr. J. G. Swanson; that subsequent to such time and on or about December 7, 1931, appellant and her husband through their agent Mr. J. G. Swanson, entered into a conditional sales contract with appellee, covering the furnace and heating equipment which had been installed during the time the Karrs occupied the premises under their purchase contract; that following the execution of the conditional sales contract for the furnace on December 7, 1931, on behalf of appellant and husband, they paid to appellee thereon the sum of \$20, and thereafter on February 8, 1932, paid the sum of \$10. It is stipulated that the furnace as installed, did not become a part of the real estate. It is further stipulated that appellant rendered statements repeatedly to appellee and made other collection efforts, and that on March 4, 1938, came to the house for the purpose of removing the furnace; that appellee refused appellant the right to remove same; that this suit resulted; that the fair and reasonable value of the furnace on March 4, 1938, was \$283.

The court dismissed appellant's complaint for injunction for want of equity and rendered judgment in favor of appellee on its counterclaim for \$209.43. It is from this judgment appellant appeals.

We discover no error in the court's judgment and the same is hereby affirmed.

Judgment affirmed.

through her agent, Mr. J. G. Bennett, that applicant for said time
and on or about December 7, 1937, submitted to her husband a check
for \$100.00, which was cashed by him and the proceeds were used
to pay the balance of the mortgage on the property at 1110
which had been paid in full before the time the same was
received. When this mortgage was paid, the balance of the
loan on the property was also paid. On the 10th of December
7, 1937, the amount of \$100.00 was received by the husband
between the 10th and 15th of December, 1937, and
the sum of \$100.00 was paid to the husband on the 15th of
December, 1937, and the same was used to pay the balance of the
loan on the property. It is further stated
that the husband cannot remember the date of the payment and that
other collection efforts, and that on March 4, 1938, when the
husband for the purpose of receiving the same, was advised to
applied the same to the mortgage on the property at 1110
the fact that the same was paid to the husband on March 4, 1938, was
[redacted]

The above statement is submitted for information for
part of entry and request payment in favor of applicant in the
amount of \$100.00. It is further stated that the husband
applied.

It is further stated that the husband is the owner
of the property at 1110.

Very truly yours,
[redacted]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of October, in
the year of our Lord one thousand nine hundred and forty, within
and for the Second District of the State of Illinois:

Present -- The HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 315²

BE IT REMEMBERED, that afterwards, to-wit: On OCT 1 1904,
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, 1940.

FRED J. LUTHIN,

Appellee,

vs.

VILLAGE OF HINSDALE,
a Municipal Corporation,

Appellant.

APPEAL FROM CIRCUIT COURT
DUPAGE COUNTY.

HUFFMAN - J.

This was a suit by appellee to recover damages for permanent injury to real property. Trial by jury resulted in a verdict for appellee in the sum of \$1500. Appellant brings this appeal from judgment rendered thereon.

Appellee purchased the property in 1926. It appears to have been a low piece of ground. A water course, which is called Flag Creek, flowed through the tract. This creek entered appellee's premises at the northwest corner and continued in a south and easterly direction to a point about the center of the property where it angled to the north and east and left the premises at or near the northeast corner. Appellee states that during heavy rain fall, the creek would spread out and form a lake on his premises, in some places to the depth of two feet. The property slopes from the south toward the north and is about fifteen feet higher at the south side than at the north. Soon after appellee purchased the tract, the street adjacent thereto was improved by pavement, and he subdivided the premises into ten lots.

• 2000 年 1 月 1 日起

Subsequent to appellee's purchase of the land, appellant, pursuant to a plan for the straightening of Flag Creek in order to facilitate the drainage and to make better disposition of the water that accumulated therein, constructed a ditch along the north of appellee's premises and about sixty feet from his property line. The purpose of this was to divert the flow of water in Flag Creek from appellee's land into the ditch. In addition to the construction of the ditch, appellant laid tile drainage from the bed of Flag Creek where it had crossed appellee's land to the new channel in order to take care of surface water that might accumulate at the low places along the old bed of the creek.

Appellee charges that in the construction of the ditch, dirt was thrown up along the south side thereof, which served as a barrier to the flow of surface water from his premises into the newly constructed ditch and thus caused his damage. Appellant by its answer admitted that prior to the year 1932, the natural water course, known as Flag Creek, ran across appellee's land in the manner claimed by him; that pursuant to a plan for the straightening of this creek and to improve the drainage at this point, it constructed a new channel which passed along the north boundary of his premises and about sixty feet north thereof; that the water in Flag Creek was diverted to the newly constructed channel; that this ditch was at a lower level than that of Flag Creek and that suitable and sufficient drain tile was laid from the bed of Flag Creek on appellee's premises to the ditch, in order to properly drain the surface water that might accumulate in the bed of Flag Creek where its course had formerly been, over appellee's land. In addition to alleging that the drainage of appellee's premises was much improved and much more rapid and unobstructed than before, appellant set up that this work was constructed and completed in the year 1932, and that the damages claimed by appellee by reason of such work were barred by the statute of Limitations. (ch.83, sec. 16, Ill. St. 1939).

Appellee in his testimony claims that the work on the ditch was commenced in 1934, and that it was not completed until 1938. Two witnesses were called by appellee, Robert S. Hopkins, Commissioner of Public Works for appellant, and Paul Richert, a real estate broker and appraiser. It does not appear that appellee sought to establish the time of the doing of this work by either of these witnesses.

The Commissioner of Public Works, Hopkins, testified on behalf of appellant. He had held such office since 1926. He stated that a plan of improvement for the straightening of this creek and drainage of the water that accumulated therein was made in 1928, that pursuant to such plan, the new channel in question north of appellee's property line was constructed in 1932, and the tile from the old creek bed on appellee's premises to the new ditch was laid. He states that the above improvement was constructed and finally completed during that year, but that due to sluffing of dirt from the banks of the ditch, it had been cleaned from time to time in subsequent years. It further appears from the testimony of the street superintendent, Sizer, and other city employees, who were engaged in and about the digging of this ditch, that it was constructed in 1932. Appellee was employed as a laborer by appellant from 1928 to 1935, but it does not appear that he assisted in the digging of the ditch about which he complains.

Appellee is vague and uncertain in his testimony as to the time when the work complained of was done. It appears that he seeks to base the construction of the ditch upon dates and times when it was being cleaned out instead of upon the original construction. Aside from the question whether the ditch has benefitted his drainage or damaged his land as claimed, the statute of Limitations appears to have run against this action. *Schlosser v. Sanitary District of Chicago*, 299 Ill. 77. The judgment is therefore reversed.

Judgment Reversed.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of October, in
the year of our Lord one thousand nine hundred and forty, within
and for the Second District of the State of Illinois:

Present -- The HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 316

BE IT REMEMBERED, that afterwards, to-wit: On DEC 17 1940
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, 1940.

AMERICAN RADIATOR AND SANITARY
CORPORATION, a Corporation,

Appellant,

vs.

LEO J. WILHELMI and ANNA I.
WILHELMI, ET AL.,

Appellees.

APPEAL FROM THE CIRCUIT COURT
WILL COUNTY.

HUFFMAN, - J.

On September 11th, 1936, appellee, Henry J. Leser, procured a decree in foreclosure in the Circuit Court of Will County upon certain real estate owned by Leo J. Wilhelmi and his wife, Anna, pursuant to a trust deed securing \$12,000 indebtedness. Among the several parties defendant was appellant herein, it, at such time, being a judgment creditor of Wilhelmi. Personal service was had upon appellant. It made no appearance in the case. Appellee Leser purchased the property at the Master's sale, later assigning his Certificate of Purchase to appellee, Robert Barber. Following the expiration of the period of redemption, a deed to the premises was issued to Barber on March 1st, 1938.

On March 8th, 1939, appellant filed this suit, which it designates as a complaint for review, praying that all proceedings in the foreclosure suit subsequent to the filing of the complaint for foreclosure be reviewed and set aside on the ground of fraud.

Certain of appellees filed their motion to dismiss the complaint. They assign fifteen points in support of such motion. Under date of February 8th, 1940, the Court granted the motion to

dismiss. However, it does not appear that appellant elected to stand by its complaint nor does any final judgment or decree appear, either in the abstract or the record.

An order sustaining or overruling a motion to dismiss a bill of complaint is not final in character within itself. In order to appeal therefrom, there must be a final order or decree in a Chancery suit and a final judgment in a suit ~~at~~ Law. By the provisions of the Civil Practice Act, appeals may be prosecuted to review final judgments, orders or decrees. *Prange v. City of Marion*, 297 Ill. App. 353; 17 N.E. (2d) 616; *Board of Education v. Board of Education*, 301 Ill. App. 228; 22 N. E. (2d) 400.

In view of the long and uninterrupted holding in this respect, the appeal herein is dismissed.

Appeal Dismissed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

41118

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN RUSCH,

Appellee,

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

ALIOUS JOHNSON, MARY CURTISS and
THEODIA HAYS,

Appellants.

308 I.A. 316²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

A verified petition was filed by John Rusch, chief clerk of the Board of Election Commissioners of Chicago, against defendants who were judges and clerks at a primary election held April 12, 1938, charging them with misconduct and misbehavior as such judges and clerks and praying that they be adjudged in contempt of court. Defendants denied the charges made against them and after the evidence was heard the court found the two clerks of election not guilty and they were discharged. The judges of election were found guilty, defendant Hays was sentenced to serve one year in the County jail of Cook county, and Mary Curtiss and Alious Johnson, the other two judges, fined \$500 each. The three judges appeal.

At the beginning of the hearing counsel for the People said: "The main point in this case is assistance to voters." The ballots were opened and recounted and at the conclusion of the hearing, in summing up the case, counsel for the People stated to the court: "The count is substantially correct." The Court: "Yes, it seems to be."

The evidence was to the effect that a great many voters were assisted in marking their ballots who were not entitled to such assistance, and without making affidavits as required by the statute; that but 25 blank affidavits were sent to the precinct by the Board of Election Commissioners; that the printed applications for ballots made by the voters as they appeared at the polling place showed the judges had checked such applications indicating that 89 persons had applied for assistance; that during the voting some one of defendants or some one at their request endeavored to get in touch with the Election Com-

610

41118

THE PEOPLE OF THE STATE OF ILLINOIS,
 ex rel. JOHN SMITH,
 Respondent,
 v.
 ALBION JOHNSON, MARY CURTIS AND
 JACOBIA MAY,
 Appellants.

3081 A 176

MR. PRESIDING JUDGE E. CONWAY DELIVERED THE OPINION FOR THE COURT.
 A verified petition was filed by John Smith, chief clerk of
 the Board of Election Commissioners of Chicago, against respondents
 were judges and clerks at a primary election held April 11, 1900,
 charging them with misconduct and disobedience to good judges and clerks
 and praying that they be adjudged in contempt of court. Respondents
 denied the charges made against them and after the evidence was heard
 the court found the two clerks of election not guilty and they were
 discharged. The judges of election were found guilty, respondents deny
 was sentenced to serve one year in the county jail of Cook county, and
 Mary Curtis and Albion Johnson, the other two judges, fined \$200 each.
 The three judges appeal.

At the beginning of the hearing counsel for the people said:
 "The main point in this case is assistance to voters. The ballots
 were opened and recounted and at the conclusion of the hearing, in
 summing up the case, counsel for the people stated to the court: 'The
 count is substantially correct.' The Court: 'Yes, it seems to be.'
 The evidence was to the effect that a great many voters were
 assisted in marking their ballots who were not entitled to such assist-
 tance, and without making affidavits as required by the statute; that
 but 25 blank affidavits were used as was provided by the statute of
 Election Commissioners; that the printed applications for ballots sent
 by the voters as they appeared at the polling place showed the judges
 had checked such applications indicating that 50 persons had applied
 for assistance; that during the voting some one of assistance or some

missioners' office and obtain more blank affidavits but was unable to do so.

Defendant Hays, a Democratic judge, testified that about 98% of the people in the precinct were colored; that he witnessed the signatures of the voters when applying for ballots and the Republican judge, defendant Johnson, and himself assisted the voters when requested; that practically all of the voters after being in the booth a minute or so would come out and ask for assistance and most of them had sample ballots showing the names of persons for whom they wished to vote; that "They seemed to become spellbound after they got in the booth with the ballot, they didn't know what to do with it. They would come out and ask me to go in, and I would call Mrs. Curtiss." [The Republican judge.] That he and Mrs. Curtiss would then give the voter assistance, sometimes marking the ballot in accordance with the sample ballot, as requested by the voter. He further testified he had worked at a prior election once as a clerk. On cross-examination he testified: "nearly everybody had sample ballots and still they couldn't mark them." That he was sworn in at the polling place on the morning of election because a judge failed to appear.

Defendant Johnson testified he was a Republican judge of election and this was the second time he had served; that about 98% or 99% of the precinct was colored: "Most of them are very illiterate. *** they can't do much reading or writing. Most of them have to have some kind of assistance;" that throughout the day Leo M. Nahin, a watcher from the Election Commissioners, remained in the polling place; that the witness did not instruct any of the people how to vote; that was done by the Democratic judge, Hays, and the Republican judge, Mrs. Curtiss; that in the morning the polling place was crowded, most of the voters needing assistance, and bringing in sample ballots; that after the voters signed an application for a ballot and their signatures were compared, "they receive the ballots, they go in the booths and become puzzled, then after they are in there they have to call the two judges

missioners' office and remain more than thirty minutes and was unable to do so.

Reverend Mr. [Name], a Methodist minister, testified that about 100

of the people in the street were gathered; that he witnessed the

signatures of the voters when signing for ballots and the registration

Judge, [Name] Johnson, and himself assisted the voters when they

requested; that practically all of the voters after being in the booth a

minute or so would come out and ask for assistance and most of them had

sample ballots showing the names of persons for whom they wished to

vote; that "they seemed to become embarrassed after they got in the

booth with the ballot, they didn't know what to do with it. They would

come out and ask me to go in, and I would call Mrs. [Name], [Name]

Republican Judge, [Name] and Mrs. [Name] would then give the voter

assistance, sometimes handing the ballot in accordance with the sample

ballot, as requested by the voter. He further testified he had worked

at a prior election [Name] as a clerk. On cross-examination he testified

"nearly everybody had sample ballots and still they couldn't vote

them." That he was sworn in at the polling place on the morning of

election because a Judge failed to appear.

Reverend Johnson testified he was a Methodist pastor at

election and that the [Name] time he had served; that about 100 or

200 of the [Name] was [Name]; most of them are very illiterate,

they can't do much reading or writing. Most of them have no other work

kind of assistance; that throughout the day and [Name], a [Name]

from the Election Commissioners, remained in the polling place; that

the [Name] did not indicate any of the people how to vote; that they

done by the Democratic [Name], [Name], and the Republican [Name], [Name]

Christ; that in the morning the polling place was crowded, most of the

voters needing assistance, and [Name] in sample ballots; that after

the voters signed an application for a ballot and their signatures were

corrected, "they receive the ballot, they go in the booth and become

for assistance;" that "some of them can read newspapers, bibles, something like that, you can give them a ballot and put them in the booth, they can read other kind of papers, but they don't understand what a ballot is about." On cross-examination he testified: "I saw Nahin, the watcher, representing the Board of Election Commissioners, *** He brought in the ballots;" that the clerks did all the tallying, "They were not relieved nor did we stop during the night for a little something to eat. *** We worked right straight through until the next morning."

Defendant Mary Curtiss testified she was a Republican judge, was married and had two children; that her grocery man had recommended her for appointment and she was sworn in on the morning of election; that a man brought the ballots on a truck and stayed all day; that she initialed the ballots and gave them to the voters when the other judges indicated they were entitled to vote; that in assisting voters she did not mark the Democratic ballots but only the Republican. The Democratic ballots were marked by the Democratic judge, Hays.

The evidence further shows there were 263 Democratic ballots cast and 13 Republican.

Mr. Cashen, counsel for the People, on the hearing stated they were unable to get in touch with Mr. Nahin and it was stipulated that Nahin was a watcher for the Board of Election Commissioners and if present would testify he arrived at the polling place at 5:45 a. m. and left about the same time the next morning; that he was absent about half an hour from the polling place; that "Persons voted by assistance in the polling place, and the person accompanied into the booth by two precinct officials;" that assistance was given to voters whose names did not appear on the list of 47 names sent out by the Election Commissioners who they said might require assistance. "Several persons whose names did not appear on such list were illiterate and were assisted, and no person other than the judge or clerk of election helped a person to mark his ballot. Forty persons were allowed to vote

for assistance; that some of them can read newspapers, letters, and
 thing like that, you can give them a ballot and let them in the booth,
 they can read other kind of papers, but they can't understand what a
 ballot is about." On cross-examination he testified: "I saw Nathan,
 the witness, representing the Board of Election Commissioners, brought in the ballots; that the clerk told all the tallying, "That
 were not relieved nor did we stop during the night for a little while
 thing to eat, we worked right straight through until the next
 morning."

Defendant Mary Quinlan testified she was a Republican judge,
 was married and had two children; that her property was recommended
 her for appointment and she was sworn in on the morning of Election;
 that a man brought the ballots on a truck and started all day; that she
 initiated the ballots and gave them to the voters when the other judges
 indicated they were entitled to vote; that in counting voters she did
 not mark the Democratic ballots but only the Republican. The Demo-
 cratic ballots were marked by the Democratic judges, says.

The evidence further shows there were 50 Democratic ballots
 cast and 13 Republican.

Mr. Graham, counsel for the people, on the hearing stated
 they were unable to get in touch with Mr. Nathan and it was suggested
 that Nathan was a witness for the Board of Election Commissioners and he
 present would testify he arrived at the polling place at 1:15 p. m. and
 left about the same time the next morning; that he was absent about
 half an hour from the polling place; that "certain votes of assistance
 in the polling place, and the names recommended into the ballot by two
 precinct officials; that assistance was given to voters whose names
 did not appear on the list of names sent out by the Election Com-
 missioners who they said might require assistance. Several persons
 whose names did not appear on such list were assisted and were
 assisted, and no person other than the judge or clerk at election hall-

whose cards were not in the precinct binder, affidavits in such cases taken from a voter. During the tallying and counting of the votes, the judges and clerks did not split into two teams, and no other person than judges or clerks of election called or tallied the votes. *** I noted about one-third of the votes cast were by assistance. There was very little questioning of these voters' registration, and I tried to contact the Election Commissioners' office on the phone to verify registration from the Master file, but was unable to do so."

Katherine Keeler, (called by the People) who it was stipulated was "qualified as an expert to testify to the cross marks" testified she examined the ballots shortly before the trial; that she photographed eleven of the ballots, a number of which were marked by one person. "I found no erasures or indentations or embossings on any of the ballots. The number of ballots is 143."

Other witnesses were called and there is considerable other evidence in the record but we think it unnecessary to refer to it here

Counsel for the People, in summing up the case said: "Now, the idea is not to deny assistance to voters that needed assistance, but the whole point of the law is to prevent voters from being voted. Even though these persons might have been entitled to assistance and given assistance if the examination were made properly, and the judges of election felt that they assisted people who should be assisted, of course, I think they are the last say in that polling place. I don't think the Board of Election Commissioners or the County Court, or anyone, can tell the judges of election on election day just what they can do. The count is substantially correct. I think this whole prosecution is based simply on the question of not assisting voters as provided by statute." The court then found the two clerks not guilty, discharged them and said: "Is there anything you want to state to me before I pronounce a finding or judgment in this case?" Mr. Hays [defendant]: "Yes, I would like to say, if you were in my place in the

whose cards were not in the precinct officer's possession in some cases taken from a voter. During the tallying and counting of the votes, judges and clerks did not split into two teams, and no other person than judges or clerks of election called on called the votes. I noted about one-third of the votes cast were by mail ballot. There was very little questioning of these voters' registration, and I failed to contact the Election Commissioners' office on the phone to verify registration from the master file, but was unable to do so.

Katherine Learer, (called by the people) who is the attorney stated was "qualified as an expert to testify to the above matters." testified she examined the ballots shortly before the trial; that she photographed eleven of the ballots, a number of which were marked by one person. "I found no evidence or indications of tampering on any of the ballots. The number of ballots is 12."

Other witnesses were called and there is substantial evidence in the record but we think it unnecessary to refer to it here. Counsel for the people, in summing up the case said: "Now, the idea is not to deny assistance to voters that needed assistance, but the whole point of the law is to prevent voters from being voted. Even though these persons might have been entitled to assistance and given assistance if the examination were made properly, and the judges of election felt that they assisted people who would be entitled, of course, I think they are the last say in that polling place. I don't think the Board of Election Commissioners or the County Board, or any one, can tell the judges of election or election day just what they can do. The count is substantially correct. I believe this whole

prosecution is based simply on the question of not assisting voters as provided by statute." The court then found the two counts not guilty, discharged them and said: "Is there anything you want to state to me before I pronounce a finding or judgment in this matter?" Mr. Wey (the defendant): "Yes, I would like to say, if you were in my place in the

polling place that day, just what would you do if someone would come in, and after they got in the booth, they stood there, and don't know what to do. Don't know what to do. The majority of the people have a sample ballot, and he takes it out and just stands there. We wouldn't get anything done. They looked out and ask, will you assist me in this. Just what can I do. How will I mark it. Oh, they can sign their name, but they don't know what to do with the ballot. They become spellbound after they get it." The Court: "They had a choice of just two or three offices that they were interested in. *** You see Igoo got 249 votes and 248 on the recount; Lucas got only 1 and Jenkins 3. The majority of them were on that one office. When they got to State Treasurer, Campbell had 96, Wieland, [for Superintendent of Public Instruction] 92, Orlikowski, [for Clerk of the Supreme Court] 79; *** The County Judge, they were interested in the County Judge, 249 [his opponent, the trial judge in the instant case, 4] *** if a man come in to me and said, well, now, I am interested, how do I go about this, and I would say, what do you want, and he said, United States Senator Lucas, well, that is the line, Lucas or Igoo, and there is the County Judge. What you did, you went in and marked the ballot for them." Mr. Hays: "They had sample ballots, nearly everyone who came in had sample ballots with them, ***" The Court: "Johnson did not go in and mark at all. He compared signatures all day. Mrs. Curtis, you helped in the marking of the ballots?" Mrs. Curtis: "Yes. *** you could give the majority of those people a slip with names on and give it to them and tell them to mark an X behind that name from the top to here, *** They couldn't do it." The court then imposed the sentences as heretofore stated.

The record discloses the trial judge was a candidate for re-election for the office of County judge at the primary election in question and although the point is not made that he was thereby disqualified to sit and hear the case, yet we feel the question of disqualification is inherent in the case. Schmidt v. United States, 115

polling place that day, just what would you do if someone would come in, and after they got in the room, they stood there, and don't know what to do. Don't know what to do. The majority of the people came sample ballot, and he takes it out and just stands there. He wouldn't get anything done. They looked out and ask, will you assist me in this. Just what can I do. Now will I assist it. Yes, they can assist me name, but they don't know what to do with the ballot. They cannot spellbound after they got it. The court: "They had a choice of just two or three offices that they were interested in. You see those got 249 votes and 248 on the record; those got only 1 and 2 on the The majority of them were on that one office. When they got to office Treasurer, Campbell had 95, Ireland, [for representatives of Dublin Instruction] 92, Orlowski, [for Clerk of the Supreme Court] 70; The County Judges, they were interested in [for County Judges, 200 [all opponent, the trial judge in the instant case, 4] *** it is a man come to me and said, well, now, I am interested, how do I go about this, and I would say, what do you want, and he said, United States Senator Lucas, well, that is the time, latest or 1900, and there is the County Judges. What you did, you went in and marked the ballot for them. He says: "They had sample ballots, nearly everyone who came in had sample ballots with them. *** The court: "Johnson did not go in and mark at all. He compared signatures all day. Mr. Curtis, you marked in the marking of the ballots." Mr. Curtis: "Yes. *** you would give the majority of those people a slip with names on and give it to them and tell them to mark an X behind that name from the top to the bottom, they couldn't do it." The court then imposed the sentences as indicated stated.

The record discloses the trial judge was a candidate for re-election for the office of County Judge at the primary election in question and although the point is not made that he was disqualified as qualified to sit and hear the case, yet we feel the question of dis-

Fed. (2d) 394; People ex rel. Rusch v. Cunningham, #40896; People ex rel. Rusch v. Lidovsky, et al., #40849, the opinions in the last two cases being this day filed.

In the Schmidt case, which was an appeal by Schmidt and Mau who had been adjudged guilty of contempt for disclosing matters that took place before a Federal grand jury, certain other defendants filed affidavits of bias and prejudice against the judge. The court held the judge should not have heard the matter and continuing said: "We do not adjudge that any unfairness permeated the trial of these cases, but to eliminate the 'chance' that such existed, the judgment should be reversed and the cases remanded for further proceedings before another judge. *** Appellant Schmidt urges that the judge should have withdrawn from consideration of the case against him, on the ground that judicial impartiality had been blurred by personal factors. Appellant Mau does not directly make the point but we feel that the feature is inherent in both cases."

Since the judgment must be reversed and the case remanded we think we ought to say the contention made by counsel for defendants that the punishment is excessive must be sustained. There is no contention that anyone was permitted to vote who was not entitled to vote, and all the evidence is to the effect that the ballots were marked for those receiving assistance as requested. The count of the ballots is admittedly correct. The offenses of which defendants were convicted are that they assisted voters who were not entitled to receive assistance, and without requiring the voters to make an affidavit as required by the statute. There was no secrecy as to what was done in this respect and no denial by defendants. Although a watcher for the Board of Election Commissioners was at the polling place all day, so far as the record discloses, he made no complaint that voters were being assisted who were not entitled to assistance and that affidavits were not required.

Ref. Ruch v. Ruch, at 11, 14042, the opinion in the last two

cases being this day filed.

In the Schmidt case, which was an appeal by Schmidt and his

who had been adjudged guilty of contempt for disclosing matters that

took place before a Federal grand jury, certain other defendants filed

affidavits of bias and prejudice against the judge. The court held that

judge should not have heard the matter and continuing said: "We do not

adjudge that any unfairness permeated the trial of these cases, but to

eliminate the 'chances' that such existed, the judgment should be

reversed and the cases remanded for further proceedings before another

judge. *** Appellant submit that the judge should have withdrawn

from consideration of the case against him, on the ground that judicial

impartiality had been blurred by personal factors. Appellant can show

not directly make the point but we feel that the feature is inherent in

both cases."

Since the judgment must be reversed and the case remanded we

think we ought to say the contention made by counsel for defendants

that the punishment is excessive must be withdrawn. There is no con-

tention that anyone was entitled to vote who was not entitled to vote

and all the evidence is to the effect that the ballots were marked for

those receiving assistance as requested. The court of the District is

admittedly correct. The offense of which defendants were convicted

are that they assisted voters who were not entitled to receive assis-

tance, and without regarding the voters as being an affidavit as re-

quired by the statute. There was no secrecy as to what was done in

this respect and no denial by defendants. Although a witness for the

Board of Election Commissioners was at the polling place all day, so

far as the record discloses, he made no complaint that voters were

being assisted who were not entitled to assistance and that affidavits

were not required.

If on retrial defendants are found guilty, we think a moderate fine would be sufficient punishment. People ex rel. Rusch v. William, 292 Ill. App. 228. The judgment of the County Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, J., concurs.

Mr. Justice Matchett specially concurring.

I do not, in view of the evident intention of the legislature to provide a secret ballot, regard the giving of assistance to voters not entitled to it as a light matter. Where done with intent to evade the law I think it might well deserve a jail sentence.

It is not a defense, as I have said, to say that

moderate time would be sufficient punishment. People v. ...

Winters, 222 Ill. App. 222. The judgment of the County Court of Cook

County is reversed and the cause remanded.

REVEREND AND HONORABLE

Respectfully, J. J. Conover.

Mr. Justice Matthews specially concurring.

I do not, in view of the evident intention of the Legislature

to provide a secret ballot, regard the giving of assistance to voters

not entitled to it as a light matter. There were some who intend to evade

the law I think it might well deserve a jail sentence.

41115

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN S. RUSCH,

Appellee,

APPEAL FROM

EMANUEL SOLOMON, BENJ. L. ORLOFF
and MARGARET JENNINGS,

Appellants.

COUNTY COURT,

COOK COUNTY.

308 I.A. 317

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is another election case in which the judges and clerks were charged with misconduct at a primary election held at Chicago on April 12, 1938. Margaret Jennings, a judge, was found guilty and fined \$500. Emanuel Solomon was found guilty and sentenced to the County jail for one year. Ben Orloff was found guilty and sentenced to the County jail for two years. These three appeal to this court from the judgments entered.

It is first contended that the County court had no legal authority to open the ballot box and put the ballots in evidence. The right to do this has been sustained by the Supreme court. Stockholm v. Daly, 374 Ill. 441.

It is next contended that the trial judge was disqualified by personal interest. The record shows he was a candidate for nomination at this April, 1938 primary, at which the respondents served as election officials. It appears his candidacy furnished the most controversial issue of the primary, and it was charged against respondents that they permitted alteration and erasure of ballots in order to favor his opponent.

In a similar case we have held that the trial judge was disqualified. (People ex rel. Rusch v. Cunningham, Gen. No. 40896, opinion filed today.) In that case the disqualification of the trial judge was raised by a motion supported by affidavit to facts not denied. Here the question was not raised by any motion, and technically respondents must be held to have waived the point but as said in Schmidt v. United States, 115 Fed. (2d) 394, the personal factor "is

4115

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES A. WELCH,
Appellee,

vs.
ERNEST L. BARNETT, JR.,
and MARSHALL C. BARNETT,
Appellants.

MR. JUSTICE McLELLIN delivered the opinion of the court.

This is another election case in which the judges and clerk were charged with misconduct at a primary election held at Chicago on April 12, 1938. Ernest L. Barnett, Jr., a judge, was found guilty and fined \$500. Marshall C. Barnett was found guilty and sentenced to the County Jail for one year. Ben Barnett was found guilty and sentenced to the County Jail for two years. These three appeal to this court from the judgments entered.

It is first contended that the County Court had no legal authority to open the ballot box and put the ballots in evidence. It is right to say that this has been sustained by the Supreme Court. People v. Daly, 374 Ill. 441.

It is next contended that the trial judge was disqualified by personal interest. The record shows he was a candidate for reelection at this April, 1938 primary, at which the respondents served as election officials. It appears his candidacy prevented the more controversial issue of the primary, and it was charged against the respondents that they perverted administration and character of the election in order to favor his opponent.

In a similar case we have held that the trial judge was disqualified. (People ex rel. Barnett v. Barnett, 369 Ill. 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

inherent" in the case. In People ex rel. Rusch v. Lidovsky, et al., No. 40849, opinion filed this day, we said the personal interest of the trial judge may be considered as we weigh the evidence and consider the charges of guilt and the penalties inflicted.

One of the charges was that respondents allowed persons to vote who were registered in the precinct from other than their actual residence. The judgment order found the three respondents guilty of this offense. Eight witnesses testified that they were not registered from their actual place of residence although they resided in the precinct. Some of them registered from their business addresses and others maintained two places of residence. At the time they voted none of them told the respondents their actual places of residence. Each of them testified that he or she voted only once in the primary. The primary law (Ill. Rev. Stats. 1939, ch. 46, par. 433, §69(3)) provides for the punishment of judges of election who "knowingly" permit unqualified persons to vote.

Respondents were next charged with giving illegal assistance to voters. Sixteen witnesses testified they were given assistance in marking their ballots. They give a variety of reasons for this. Some voters said they had broken or forgotten their glasses and asked for assistance. Some of the voters requesting assistance could not read or write. Others were voting for the first time and asked for help. The record tends to show that each of these voters cast the ballot precisely as he or she wished.

A watcher employed by the Election Commissioners testified he arrived at the polls at 4:45 in the morning and remained until the count had been completed; that he watched pretty carefully and made a written report to the Election Commissioners. This report was not offered in evidence. He testified he saw no one tamper with or erase any ballots and saw no ballots with erasures on them.

Apparently some of the voters given assistance received it without signing written affidavits, as required. Mrs. Jennings, one of

inherent in the case. In People v. ..., No. 40842, opinion filed July 1, 1951, it was held that the purpose of the trial judge may be considered as he weighs the evidence and considers the charges of guilt and the penalties involved.

One of the charges was that respondents allowed persons to vote who were registered in the precinct from other than their actual residence. The judgment order found the three respondents guilty of this offense. Eight witnesses testified that they saw and registered from their actual place of residence although they resided in the precinct. Some of them testified from their precinct addresses and others maintained two places of residence. At the time they voted, none of them told the respondents their actual places of residence. Each of them testified that he or she voted only once in the precinct. The primary law (Ill. Rev. Stat. 1953, c. 40, par. 180(5)) provides for the punishment of judges of election who "knowingly" permit unqualified persons to vote.

Respondents were not charged with giving illegal assistance to voters. Eight witnesses testified that they given assistance in marking their ballots. They give a variety of reasons for this. Some voters said they had broken up for their own reasons and asked for assistance. Some of the voters requesting assistance would not read or write. Others were voting for the first time and asked for help. The record tends to show that each of these voters cast the ballot precisely as he or she wished.

A witness employed by the Election Commission testified he arrived at the polls at 4:45 in the morning and remained until the count had been completed; that he watched every carefully and made a written report to the Election Commissioner. This report was not entered in evidence. He testified he saw no one tamper with or change any ballots and saw no ballots with evidence on them.

the defendants, testified she would have such voter swear orally that he or she was unable to read or write; that they had received no instructions from the Election Commissioners and were not aware of any distinction between oral and written affidavits; that when the attention of the judges was called to the blank form of printed affidavit these were used, but there were only 25 of these, which were exhausted in a comparatively short time. Respondent Orloff testified that he tried several times to call the Election Commissioners to secure printed forms of affidavits, but without success, and then tried to borrow some from a neighboring polling place, without success. It was testified that no voter was assisted unless he made an affidavit of illiteracy, either oral or written. All of the assisted voters were registered in the precinct and entitled to vote.

John Bilka testified for the respondents that he was selected as a watcher through the office of the State's Attorney; that he remained at the polling place until the count was completed; that he saw no person erasing or tampering with the ballots.

Katherine Keeler testified as a handwriting expert. She did not commence to examine the ballots until almost 17 months after they had been deposited at the city hall. She gave testimony tending to show there were erasures and alterations of the ballots.

Also should be taken into consideration the quarters furnished by the Election Commissioners in which to hold the primary. The polling place was in the 61st precinct of the 24th Ward, in a small delicatessen and candy store, 40 feet in depth and about 20 feet wide; a soda fountain was on one side and on the other side a candy stand; there was also a delicatessen and lunch counter and a counter for school supplies. The ballot box was on a round table such as is ordinarily found in ice cream parlors. The store was open for business all the time and customers came into the store, passing the table occupied by the election officials. Numbers of children entered the store from time to time.

The clerks, Margaret Malee and Frank Freedman, were inexperienced in this class of work and the court properly found them not guilty.

Margaret Jennings, who was found guilty and fined \$500, was the mother of two minor children and a third child was born four months after the primary. She had no political connections, no interest in the outcome of the election and took the job on account of the compensation of \$8. Emanuel Solomon, found guilty and sentenced to one year in the County jail, had never previously served as a judge or clerk. Orloff, who was found guilty and sentenced to the County jail for two years, testified he had no interest in any particular candidate; that he had previously served as a clerk in an election but not as a judge.

We are not satisfied with the findings of the court nor the penalties imposed. As we said in People ex rel. Rusch v. Lidovsky, supra, "It is just as important that persons accused but innocent should be exonerated as that those guilty should be punished."

For the reasons indicated the judgments will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P.J., and Matchett, J., concur.

The clerk, Margaret White and Frank Freeman, were interviewed in this case of work and the court properly found them not guilty.

Margaret Jennings, who was found guilty and fined \$500, was the mother of two minor children and a third child was born four months after the primary. She had no political connections, no later set in the outcome of the election and took the job on account of the recommendation of J. Emanuel Johnson, found guilty and sentenced to one year in the County Jail, had never previously served as a judge clerk. Dr. Hoff, who was found guilty and sentenced to the County Jail for two years, testified he had no interest in any particular candidate; that he had previously served as a clerk in an election but not as a judge.

We are not satisfied with the findings of the court nor the penalties imposed. As we said in People ex rel. Mason v. Lindsay, "It is just as important that persons accused but innocent should be exonerated as that those guilty should be punished." For the reasons indicated the judgments will be reversed and the cause remanded for a new trial.

REVEREND AND HONORABLE

O'Connor, J., and McHugh, J., concur.

41407

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a Corporation,

Appellee.

v.

ANTON A. MONTRESOR and ELFRIDA
MONTRESOR,

Appellants.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

308 I.A. 317²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint in chancery asking that a life insurance policy issued by it to defendant Anton A. Montresor be declared void and that defendants be restrained from bringing any suit predicated upon this policy; the cause was referred to a master in chancery who heard the evidence and made a report, recommending a decree as prayed for; exceptions were overruled and decree was accordingly entered, from which defendants appeal.

October 26, 1937, plaintiff issued its life insurance policy in the sum of \$5000 to defendant Anton A. Montresor. The complaint alleges that Montresor made false and untrue representations as to his physical condition which induced plaintiff to issue the policy; that had plaintiff known these answers were false and untrue it would have rejected the application and refused to issue the policy. Plaintiff offers to return all premiums paid.

The master found that in his application Anton Montresor, in answer to the question as to whether he had syphilis, answered "No," and that he had never had a serious illness or surgical operation. The evidence shows and the master found that in December, 1932, Montresor had been visited by his doctor, William J. Vynalek, who found him suffering from a large right hernia; that Montresor was operated on for this at the Berwyn Hospital; that at that time an examination was made of him and the tests showed he had syphilis. Defendant continued being treated by the doctor for syphilis from the time he left the hospital, in January, 1933, until March, 1933. The

ALSO

THE PRINCIPAL IN THE CASE OF AMERICA, A CORPORATION, PLAINTIFF,

VERSUS

v.

ANTON A. MONTREUR, DEFENDANT.

Plaintiff.

3081A.317

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint in chambers asking that a life insurance policy issued by it to defendant Anton A. Montreur be declared void and that defendant be restrained from bringing any and predicated upon this policy; the cause was referred to a master in chambers who heard the evidence and made a report, recommending a decree as prayed for; exceptions were overruled and decree was accordingly entered, from which defendant appeals.

October 26, 1937, plaintiff issued its life insurance policy in the sum of \$500 to defendant Anton A. Montreur. The complaint alleges that Montreur made false and untrue representations as to his physical condition which induced plaintiff to issue the policy; that had plaintiff known these answers were false and untrue it would have rejected the application and refused to issue the policy. Plaintiff offers to return all premiums paid.

The master found that in his application Anton Montreur, in answer to the question as to whether he had syphilis, answered "no," and that he had never had a serious illness or surgical operation. The evidence shows and the master found that in December, 1937, Montreur had been visited by his doctor, William J. Vynnyak, who found him suffering from a large right hernia; that Montreur was operated on for this at the Brooklyn Hospital; that at that time an examination was made of him and the tests showed he had syphilis. Defendant continued being treated by the doctor for syphilis from the time he left the hospital, in January, 1937, until March, 1937. The

master also found Montresor was an insane person and was represented in this cause by a guardian ad litem.

The argument of defendants seems to be to question the tests given to Montresor which gave evidence that he was suffering from syphilis. Dr. Vynalek testified he gave Montresor intravenous injections of neosalvarsan and other medicines usually given for syphilis. He also testified that syphilis frequently brings on evidence of "brain changes," leading to paresis. The master and the decree found that Anton Montresor was an insane person, confined in the Manteno State Hospital. The medical testimony is uncontradicted.

It has been held in a number of cases that a court of review will not disturb the conclusions of the master and the chancellor unless they are contrary to the weight of the evidence. Metropolitan Life Ins. Co. v. Shattas, 298 Ill. App. 336; Pasedach v. Auw, 364 Ill. 491, and Brainard v. Brainard, 373 Ill. 459.

Undoubtedly Montresor knew his representations that he had never had any serious illness and never suffered a surgical operation or ever been in a hospital, were untrue. However, this is a chancery proceeding brought by the insurance company to cancel the policy, and in Western & Southern Life Ins. Co. v. Tomasun, 358 Ill. 496, 502, the court said that in an equitable action of this kind, misrepresentation "will avoid the policy if they are, in fact, false and material to the risk even though made through mistake or in good faith."

This is not a case like Thompson v. State Mut. Life Assur. Co., 305 Ill. App. 255, which was an action at law to recover on a life insurance policy where the court found the applicant for insurance did not falsely answer any questions or misrepresent any matter in his application for insurance.

There is no evidence that plaintiff waived the fraud, and waiver was not pleaded. *Feder v. Midland Casualty Co.*, 316 Ill. 552.

We cannot say the decree is against the manifest weight of the evidence, and it is affirmed.

DECREE AFFIRMED.

Matchett, J., concurs.

(see next page)

master also found Montreux was an insane person and was represented in this case by a guardian ad litem.

The argument of defendant seems to be in question the testimony given to Montreux which gave evidence that he was suffering from syphilis. Dr. Vynaler testified he gave Montreux antisyphilitic injections of neosalvarsan and other medicines usually given for syphilis. He also testified that syphilis frequently brings on evidence of "brain changes," leading to paranoia. The master and the court found that Anton Montreux was an insane person, confined in the Wisconsin State Hospital. The medical testimony is uncontradicted.

It has been held in a number of cases that a court of review will not disturb the conclusions of the master and the chancellor unless they are contrary to the weight of the evidence. Wernholm v. Life Ins. Co., 200 Ill. App. 322; Leachman v. Ins., 324 Ill. 431, and Wernholm v. Wernholm, 373 Ill. 431.

Undoubtedly defendant knew his representations that he had never had any serious illness and never suffered a surgical operation or ever been in a hospital, were untrue. However, this is a case proceeding brought by the insurance company to avoid the policy, and in Eastern & Southern Life Ins. Co. v. Johnson, 353 Ill. 432, 433, the court said that in an equitable action of this kind, representation "will avoid the policy if only one, in fact, false and material to the risk even though made through mistake or in good faith."

There is no case like Johnson v. Johnson, 353 Ill. 432, 433, which was an action at law to recover on a life insurance policy where the court found the defendant for insurance did not falsely answer any questions or statements and master in his application for insurance.

There is no witness that plaintiff waived the fraud, and waiver was not pleaded. Wern v. Mutual Guaranty Co., 218 Ill. 322. It cannot say the master is against the earliest weight of the evidence, and it is affirmed.

-2a-

Mr. Presiding Justice O'Connor specially concurring:

I agree with the conclusion reached but not in all that is said in the foregoing opinion. Froehler v. No. Amer. Life Ins. Co., 374 Ill. 17; Joseph v. New York Life Ins. Co., 219 Ill. App. 452; Thompson v. State Mutual Life Assur. Co., 305 Ill. App. 233.

Mr. Presiding Justice O'Connor specially concurring:

I agree with the conclusion reached but not in all that is
said in the foregoing opinion. Froehner v. No. Amer. Life Ins. Co.,
374 Ill. 17; Joseph v. New York Life Ins. Co., 319 Ill. App. 452;
Thompson v. State Mutual Life Assur. Co., 305 Ill. App. 233.

41296

GERTRUDE STAHNKE and ALBERT STAHNKE,
Appellees,

APPEAL FROM

AMERICAN CARLOADING CORPORATION, a
Corporation,
Appellant.

CIRCUIT COURT,
COOK COUNTY.

308 I.A. 318

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant appeals from two judgments entered on verdicts of a jury, one for \$75 in favor of Albert Stahnke, and another for \$5000 in favor of Gertrude Stahnke. Plaintiffs sued for damages for alleged negligence of defendant, by which they were injured.

It is urged for reversal that the verdicts are against the weight of the evidence and that the court erred in not giving, as requested, defendant's refused instructions Nos. 1, 5 and 7.

The occurrence in which plaintiffs were injured took place on January 23, 1937, in Kedzie avenue (a north and south street) in Chicago, and north of 62nd street (an east and west highway). On that date, sometime between 2 and 3 o'clock in the afternoon, there was a collision between the Plymouth automobile in which plaintiffs were riding north on the east side of Kedzie and a truck of defendant driven south on the west side of that street. The owner and driver of the Plymouth was Albert Krusec, who is the son-in-law of Albert and brother-in-law of Gertrude. Albert, father of Gertrude, was about 68 years of age. His eyes needed medical attention. A doctor at Niles, Michigan, had been recommended. A trip to Niles to see this doctor was arranged. The accident occurred while returning. Albert Krusec was driving. Albert Stahnke sat beside him in the front seat; Gertrude sat in the rear seat. The weather was cold. Snow had fallen a day or two before and the street was covered with ice and snow. Two street car tracks ran north and south in Kedzie avenue. Southbound cars ran over the west tracks; northbound cars over the east tracks.

AMERICAN CORPORATION
STANDARD OIL COMPANY
INDIANAPOLIS, INDIANA
JANUARY 25, 1937

808-114-118

MR. JUSTICE HARTWELL DELIVERED THE VERDICT IN THE CASE.

Defendant appeals from the judgment entered on behalf of a jury, one for \$75 in favor of Albert Thomas, and another for \$1000 in favor of Gertrude Thomas. Plaintiff asked for damages for alleged negligence of defendant, by which they were injured.

It is urged for reversal that the verdict was against the weight of the evidence and that the court erred in not giving, as requested, defendant's request instructions No. 1, 2 and 3.

The occurrence in which plaintiff was injured took place on January 25, 1937, in Kodak Avenue (a north and south street) in Chicago, and north of Wood Street (an east and west highway). On that date, sometime between 7 and 8 o'clock in the afternoon, there was a collision between the Plymouth automobile in which plaintiff was riding north on the west side of Kodak and a truck of defendant driven south on the east side of that street. The owner and driver of the Plymouth was Albert Thomas, who is the son-in-law of Albert and brother-in-law of Gertrude. Albert, former of defendant, was about 63 years of age. His sister Gertrude Thomas, a doctor of 40 years of age, was also present. The collision occurred while returning. Plaintiff was driving. Albert Thomas was driving him in the front seat; Gertrude sat in the rear seat. The weather was cold, snow had fallen a day or two before and the street was covered with ice and snow. Two street cars tracks ran north and south in Kodak Avenue. Woodlawn runs east and west tracks; northbound runs over the east track.

The truck carried a load of about 10 tons, and the equipment weighed from 12,000 to 13,000 pounds. The automobile and tractor collided under circumstances in dispute. The evidence for plaintiffs tended to show that the tractor edged over from the west side of the street towards the east side of it and into the path of the Plymouth automobile, while defendant's evidence tended to show that the automobile moved over towards the west side of the street and skidded, striking the tractor. We shall a little later consider the weight of the evidence on this controlling point.

As to defendant's refused instructions we find no reversible error. By instruction No. 1, the jury would have been told that it was the sole judge of the facts, and that if it believed that any witness had willfully testified falsely it was at liberty to disregard his evidence except so far as corroborated by other credible evidence. This refused instruction was in substance covered by given instruction No. 20.

Defendant's refused instruction No. 7 was in substance that if there was an inherent improbability in the statement of a witness or witnesses considered in connection with all the evidence, the jury might disregard such statement or statements. The substance of this instruction was covered by given instructions Nos. 16, 18, and 20.

Defendant earnestly argues (citing many authorities) that the court erred in refusing to give its refused instruction No. 5. That instruction was: "While it is true that the negligence of the driver of an automobile cannot be imputed to a guest in such car, yet where several persons are engaged in a joint enterprise and are using an automobile in furtherance of such joint purpose and have joint control over the automobile in which all are riding, in such case the negligence of each is imputable to the other, and in this case if either of the occupants of the automobile in which the plaintiffs were riding at the time of this occurrence was negligent at or just before the happening of the accident in question in any way which proximately

The truck carried a load of about 10 tons, and the automobile weighed from 12,000 to 14,000 pounds. The automobile and truck collided under circumstances in dispute. The evidence for plaintiffs tended to show that the truck slid over from the west side of the street towards the east side of it and into the path of the automobile, while defendant's evidence tended to show that the automobile moved over towards the west side of the street and collided, striking the tractor. We shall a little later consider the weight of the evidence on this controlling point.

As to defendant's refusal instructions we find no reversible error. By instruction No. 1, the jury would have been told that it was the sole judge of the facts, and that it believed that any witness had truthfully testified falsely it was at liberty to disregard his evidence except so far as corroborated by other credible evidence. This refusal instruction was in substance covered by given instruction No. 20.

Defendant's refusal instruction No. 7 was in substance that if there was an inherent improbability in the statement of a witness or witnesses considered in connection with all the evidence, the jury might disregard such statement or statements. The substance of this instruction was covered by given instructions Nos. 16, 18, and 20.

Defendant earnestly argued (citing many authorities) that the court erred in refusing to give its refusal instruction No. 8. That instruction was: "While it is true that the negligence of the driver of an automobile cannot be limited to a quest in such case, yet where several persons are engaged in a joint enterprise and are using an automobile in furtherance of such joint purpose and have joint control over the automobile in which all are riding, in such case the negligence of each is imputable to the other, and in this case it either of the occupants of the automobile in which the plaintiff was riding at the time of this occurrence was negligent at or just before

contributed or proximately helped to bring about the accident and the plaintiffs' alleged injuries, there can be no recovery in this case."

This instruction, it will be noticed, assumes that Albert Krusec, Albert Stahnke and Gertrude Stahnke at the time of the accident were engaged in a joint enterprise, and that the automobile was being driven in furtherance of that enterprise. Gertrude Stahnke in substance said that they went to Niles on this particular day at her request and in behalf of her father; "that Mr. Krusec got his car and took us over there that morning. *** We arrived at Niles about five minutes after 10:00 o'clock *** We got right in to see the doctor *** We were there about forty-five minutes. *** We came north on Kedzie instead of Western because we like the road better." Defendant cites with others, Stoutz v. Nicoson, 270 Ill. App. 28; Thomas v. Buchanan, 272 Ill. App. 308 (reversed in 357 Ill. 270), and the same case in 277 Ill. App. 393.

In the Stoutz case the Appellate court held that if the driver of an automobile was an agent or servant of the person riding with him, the person so riding would be bound by his negligence; that the relationship between the driver of a car and a person who was injured while riding in it was of primary and vital importance; and that evidence was admissible to show that the driver was in fact such agent and servant. In other words, that the question of the relationship was for the jury.

In the Thomas-Buchanan case the Supreme court said that if there was any issue made in the trial upon the relationship between the deceased and the driver of the automobile, there was sufficient evidence to go to the jury on such issue, and that the trial court would not have been warranted in taking the case from the jury on that issue.

In Grubb v. Ill. Terminal Co., 366 Ill. 330 (reversing 286 Ill. App. 499) the Supreme court held that where one who had been riding in an automobile brought an action for personal injuries against

contributed or proximately caused to bring about the accident and the plaintiff's alleged injuries, there can be no recovery in this case.

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Substance said that they went to work on this particular day at 10:00 o'clock and arrived at about 10:30 o'clock.

It was there about forty-five minutes, and as they were about to leave, instead of western because we like the road better, I happened to come with others, Shantz v. Shantz, 270 Ill. App. 308 (reversed in 287 Ill. App. 308).

277 Ill. App. 308.

In the Shantz case the appellate court said that if the driver of an automobile was an agent or servant of the person riding with him, the person so riding would be bound by his negligence; that the relationship between the driver of a car and a person who was injured while riding in it was of primary and vital importance; and that evidence was admissible to show that the driver was in fact such agent and servant. In other words, that the question of the relationship was for the jury.

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a third party, and the evidence showed the plaintiff and the driver of the car were making the trip as a joint enterprise, there being no evidence as to who owned the car, the defendant was entitled to an instruction that plaintiff was chargeable with the negligence of the driver of the car, and that it was error to instruct the jury that plaintiff was a guest only. The facts there were clearly distinguishable from the facts here. In that case there was no evidence showing who was the owner of the car nor who was in entire control of it. Here the undisputed evidence is to the effect that Albert Krusec was the owner of the car, and that he had the entire control.

In 45 Corpus Juris, p. 1031, §588, it is said:

"To constitute occupants of a conveyance joint adventurers, there must be not only joint interest in the objects and purposes of the enterprise, but also an equal right, express or implied, to direct and control the conduct of each other in the operation of the conveyance."

In 20 R. C. L. 149, §122, it is said:

"If two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to the others."

In Blashfield's Cyclopedia of Automobile Law and Practice, §2372, pp. 171-172, it is said:

"An essential, and perhaps the central, element which must be shown in order to establish a joint enterprise is the existence of joint control over the management and operation of the vehicle and the course and conduct of the trip."

In the Restatement of the Law of Torts, §491, it is said:

"When the plaintiff is a guest, as defined in §490, comment A (which deals with distinction between 'Passenger' and 'guest'), the effect of the driver's negligence upon the plaintiff's right to recover is determined by the rule stated in that section; therefore, if there is no prearrangement for a substantial sharing of the expenses of the trip, as to which, see comment G (dealing with 'sharing expenses of trip'), the trip is not a joint enterprise merely because it is made at the request of the plaintiff, because he and his host have a common destination, because the destination or any change therein is to be determined by mutual agreement, because it is arranged that the guest is to drive alternately with his host, or even because they are going to the common destination to accomplish a purpose in which they have a common but not a business interest. No one of these facts, nor indeed all of them together, is sufficient to justify a jury or other trier of fact in finding that the trip was a joint enterprise."

a third party, and the evidence shows the plaintiff and the driver of the car were making the trip as a joint enterprise, there being no evidence as to who owned the car, the defendant was entitled to an instruction that plaintiff was chargeable with the negligence of the driver of the car, and that it was error to instruct the jury that plaintiff was a guest only. The facts there were clearly distinguished from the facts here. In that case there was no evidence showing who was the owner of the car nor who was in entire control of it. Here the undisputed evidence is to the effect that plaintiff owned the car, and that he had the entire control.

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"To constitute elements of a conveyance joint enterprise, there must be not only joint interest in the objects and purposes of the enterprise, but also an equal right, express or implied, to direct and control the conduct of each other in the operation of the conveyance."

In 20 R. C. L. 1st, § 110, it is said:

"If two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to the others."

In Blaisfield's Encyclopedia of Automobile Law and Practice, § 3232, it is said:

"An essential, and perhaps the central, element which must be shown in order to establish a joint enterprise is the existence of joint control over the management and operation of the vehicle and the course and conduct of the trip."

In the Restatement of the Law of Torts § 401, it is said:

"When the plaintiff is a guest, as defined in § 400, non-ment A (which deals with distinction between 'passenger' and 'guest'), the effect of the driver's negligence upon the plaintiff's right to recover is determined by the rule stated in that section; in other words, if there is no privity for a substantial sharing of the expenses of the trip, as to which, see comment b (dealing with 'joint expenses of trip'), the trip is not a joint enterprise merely because it is made at the request of the plaintiff, because he and the guest have a common destination, because the destination or any change therein is to be determined by mutual agreement, because it is arranged that the guest is to drive alternately with his host, or even because they are going to the common destination to accomplish a purpose in which they have a common but not a business interest. So one of these facts not indeed all of them together, is sufficient to justify a jury or

The instruction as offered assumed that the trip to Niles and return was a joint enterprise of these three persons. The question was not submitted to the jury nor does the instruction undertake to define what a joint enterprise is within the meaning of the law. We hold the court did not err in refusing to give the instruction.

The appeal seems, therefore, to turn upon the question of whether the verdicts returned were against the manifest weight of the evidence. If this was the case the court erred in denying the motion for a new trial. The defendant concedes that there was evidence for plaintiffs sufficient to require the submission of the issues of fact to a jury.

For plaintiffs there were four occurrence witnesses. The driver, Krusec, said he was going north in the east side tracks, driving about 15 miles an hour; that there was a street car and two trucks going south on the west side of the street; that the truck, to which a trailer was attached, turned east, struck the car in which plaintiffs were riding and then turned back again; that he set his brakes and the front end of the tractor or truck hit his automobile, then turned toward the west. His automobile was about 5 feet from the tractor when it turned towards him; that there was no traffic in the street going north but there was a passenger car, two trucks and a street car going south. The collision sent his car clear over to the east side of the street. The truck moved to and upon the west curb.

The testimony of Gertrude Stahnke in essentials corroborates the testimony of the driver. She said the automobile was being driven north straddling the east rail of the north bound street car tracks; that it was going about 15 miles per hour; that she first saw the truck when Krusec yelled, and it was then not more than 5 or 8 feet away. She was sitting in the back seat.

Albert Stahnke testified that he first saw the truck when it was about 6 or 7 feet away, and corroborates the evidence of the driver as to the circumstances of the accident.

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was not submitted to the jury nor does the instruction require to
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to a jury.
For plaintiffs there were four competent witnesses. The
driver, Kneese, said he was going north in the east side track,
driving about 15 miles an hour; that there was a street car and two
trucks going south on the west side of the street; that the truck, to
which a trailer was attached, turned east, struck the car in which
plaintiffs were riding and then turned back again; that he saw the
brakes and the front end of the tractor or truck hit his automobile,
then turned toward the west. His automobile was about 5 feet from the
tractor when it turned toward him; that there was no traffic in the
street going north but there was a passenger car, two trucks and a
street car going south. The collision sent his car down over on the
east side of the street. The truck moved to and down the west curb.
The testimony of the other witnesses in plaintiffs' corroborates
the testimony of the driver. He said the automobile was struck from the
north straddling the east rail of the north bound street car tracks;
that it was going about 15 miles an hour; that the truck saw the
truck when Kneese yelled, and it was then not more than 5 or 6 feet
away. He was sitting in the back seat.
Albert Wehner testified that he first saw the truck when it
was about 5 or 7 feet away, and corroborated the evidence of the driver

Plaintiffs also produced William Dryphout, who lived at 6340 S. Damen street. He was on his way to work and walking north on the east side of Kedzie. He saw the Plymouth car going north, he thinks at a speed of about 25 or 35 miles per hour. When he saw it it was straddling the east rail of the northbound tracks. He saw the Plymouth car come in contact with the truck coming in the opposite direction, and at that time the Plymouth was going north. It was not in the rails; it was just on the outside. The automobile going north passed him at a pretty good rate of speed. He was going to work and was ready to cross the street. He saw the truck and its left front wheel was outside the east rail of the southbound street car track, more than half way between the two tracks and headed southeast. This witness had talked with the investigator for the defendant company and had signed a statement. The statement was produced in court, and he read it over carefully at a recess. He then said that at the time in question he was about 50 feet north of 62nd street between 62nd and 61st place. The statement said that the left wheels of the Plymouth car were "just to the left or west of the inner rail of the northbound car tracks." The witness said he did not tell the man that when the statement was made up. He did not know whether he read the statement before he signed it but he made no complaints about it at the time. The defendant did not read the statement to the jury and objected to the jury taking it when it retired.

Kuhn, the driver of the truck, whose opportunities for seeing and knowing were better than any other of defendant's witnesses, testified that he had driven automobiles for about 7 years; that at the time the streets were a solid glare of ice and had been that way for a few days; that as he approached the scene of the accident he was straddling the west rail of the southbound track on the right side of the street and was travelling about 15 miles an hour; that he had been travelling faster than that; that he slackened his speed at 61st place because there was a street car in front of him which was slowing

The defendant did not read the statement to the jury and objected to the jury taking it when it retired.

down; that he started to slow down, too, and blinked his lights to notify those back of him that he was going to stop; that he was "fanning" the brakes (meaning that he was applying them and releasing them alternately to keep from going into a slide); that there was an automobile back of him which he could see through his mirror. He says he noticed a street car going north on the east side of the street; that the Plymouth passed the northbound ^{street} car and when about 10 feet in front of it "whipped in and went into a slide"; that its wheels got caught in the ruts from the ice and snow; that the car slid in an angle heading straight toward him, and that he turned to the curb to try to get out of the way. He says the automobile was travelling about 30 miles an hour as it approached him. The left corner of the automobile struck the left fender of his truck. He says the car came diagonally across the street in a skid. The weight of Kuhn's testimony is much impaired by the fact that he says he saw a street car going north on the east tracks, and that plaintiffs' Plymouth was driven around north on the east side and when north of it turned to the west. Of the occurrence witnesses who testified (eleven in all) no other witness says there was any northbound street car there.

Becker, driver of a wreck wagon for the Chicago Surface Lines, testified that he received a call concerning this accident at 9 minutes after 2 o'clock on the day in question, and went to the scene of the accident, arriving at 2:19 o'clock. He says there was ice and snow on the street, and that it was very slippery; that when he got there he found an automobile and a truck and trailer. The front wheels of the truck were up on the west sidewalk and the rear end of the trailer blocked the southbound car track. He hooked on to the truck and pulled it back and then got around the front end and pulled it up against the curbstone. The truck was headed southwest. The two front wheels were up over the curbing. He did not find any of the ruts of which Kuhn, the driver, testified, but there was a little ridge of ice thrown up by the wheels of the street car. He was

down; that he started to slow down, but, and missed his balance in
 notifi these back of him that he was going to stop; that he was
 "fanning" the brakes (meaning that he was applying them and releasing
 them alternately to keep from going into a slide); that there was an
 automobile back of him which he could not see through his mirror, so
 says he noticed a street car going north on the east side of the
 street; that the Lynwood passed the Newtons' car and then about 10
 feet in front of it "skipped in and went into a slide"; that the
 wheels not caught in the ruts from the ice and snow; that the car all
 in an angle heading straight toward him, and that he turned to the
 curb to try to get out of the way. He says the automobile was traveling
 and about 30 miles an hour as it approached him. He says the car
 the automobile struck the left fender of his truck. He says the car
 came diagonally across the street in a slide. The weight of the car's
 testimony is such as to lead him to believe that the car was a street
 car going north on the west side, and that the "skipping" Lynwood was
 driven around north on the east side and then north of it turned to
 the west. Of the occurrence witnesses who testified (other in all)
 other witness says there was no automobile "skipping" over him.
 Becker, driver of a wreck wagon for the Chicago Police
 lines, testified that he received a call concerning this accident at
 9 minutes after 2 o'clock on the day in question, and went to the
 scene of the accident, arriving at 2:15 o'clock. He says there was
 ice and snow on the street, and that it was very slippery; that when
 he got there he found an automobile and a street car involved. The
 front wheels of the truck were on the west sidewalk and the rear
 end of the trailer blocked the westbound car track. He looked on to
 the truck and pulled it back and then got around the front end and
 pulled it up against the sidewalk. The driver was kneeling on the
 The two front wheels were up over the curb. He did not find any of
 the rule of which rule, the driver, testified, but there was a little

cautious as he drove on account of the condition of the streets and had skid chains on.

W. P. Wilbert, a field engineer, testified that he was in an automobile travelling south on Kedzie avenue behind the trailer truck and that he had been following it for several blocks. He did not know at what speed he was travelling; he thought not much over 20 miles an hour. His wife and son were with him; his wife seated at his right. He had been watching the pneumatic brake cylinders on the rear wheels of the truck. After leaving 61st place the truck brakes were applied and the truck slowed up. As he followed the truck was straddling the west southbound rail. He was a car and a half or two cars' lengths back of the truck. He had been trying to pass it which was impossible because of the width of the truck. He did not notice anything until he heard the crash, which was loud. When he heard the crash the front end of the truck swerved over toward the west curb. He did not see anything until the car involved in the accident swung out and came swinging around on the other side of the street. He noticed the front of the left fender of the truck was smashed in. He says that the first sight he had of the passenger car was when it was swinging around to the east curb after the crash. He did not see it approach. It was impossible for him to see the actual impact. He says that all the time he followed the trailer truck it had not gone over the inside rail of the southbound track, but from where he was he could not see whether it had done so.

Mrs. Wilbert also testified. She was sitting in the front seat of their automobile with her husband. She saw the truck straddling the outside rail going south. She heard a crash and then saw the other car coming in the opposite direction on Kedzie.

L. W. McIntosh, garage owner and mechanic, recalled the accident. He said he received a 'phone call to pick up an accident case at 66th street and was rushing to it; that he was back of the car in which the Wilberts were riding. He was in a hurry and pulled in

cautious as he drove on account of the condition of the streets and had his chain on.

W. J. Albert, a fire engineer, testified that he was in an automobile travelling south on Cedar Avenue behind the trailer truck and that he had been following it for several blocks. He did not know at what speed he was travelling; he thought not more than 10 miles an hour. His wife and son were with him; his wife seated at his right. He had been watching the pneumatic brake cylinders on the rear wheels of the truck. After leaving first place the truck brakes were applied and the truck slowed up. As he followed the truck was straddling the west southbound rail. He was a car and a half or two cars' length back of the truck. He had been trying to pass it when it was impossible because of the width of the truck. He did not notice anything until he heard the crash, which was loud. Then he heard the crash the front end of the truck swayed over toward the east curb. He did not see anything until the car involved in the accident swung out and came swinging around on the other side of the street. He noticed the front of the left leader of the truck was smashed in. He says that the first sight he had of the passenger car was when it was swinging around to the east curb after the crash. He did not see it approach. It was impossible for him to see the actual impact. He says that all the time he followed the trailer truck it had not gone over the inside rail of the southbound track, but from where he was he could not see whether it had done so.

Mrs. Albert also testified. She was sitting in the front seat of their automobile with her husband. She saw the truck straddling the outside rail going south. She heard a crash and then saw the other car coming in the opposite direction on Cedar.

L. V. Belmont, street car and mechanic, recalled the accident. He said he received a phone call to pick up an accident case at 60th Street and was running to it; that he was back of the car

behind the tractor and trailer; went by three private cars and one delivery truck before he was able to get to the third. The car directly behind the truck was in the center so there was room enough to get between him and the west curb, and he had started to squeeze in there when the accident took place. He saw the line of travel of the truck just before the accident. The truck was on the southbound tracks; it did not jump over onto the northbound tracks nor cross the center line of the road; did not move in any other direction than a straight line until it was hit. At the time the accident happened the witness said he was driving between 30 or 35 miles an hour and had been following the car in front of him for about half a block. He was trying to pass the automobile in front and the truck before he got to the alley. He had just started around and tried to pass on the right when the accident happened. He did not see the body of the Plymouth before he came to a stop.

We find nothing in this evidence or in the circumstances of the case which would justify our saying that these verdicts are against the manifest weight of the evidence. The jury and the trial judge saw and heard the witnesses and this seems to be the kind of a case where the opinion of the jury and the trial judge should be final.

The judgments will be affirmed.

JUDGMENTS AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

behind the truck and trailer; and by these means the truck
delivered truck before he was able to get on the ground. The car
directly behind the truck was in the position to have been struck
to get between him and the truck, and he had started to get
there when the accident took place. He saw the line of travel of the
truck just before the accident. The truck was on the road
trucks; it did not just over take the truck; it was behind the
overlap line of the road; it did not have an open position
straight line until it was hit. At the time the accident took place the
witness said he was driving between 10 or 15 miles an hour and had
following the car in front of him for about half a block. He was
trying to pass the automobile in front and was about to pass it
to the left. He had just started around and tried to pass on the
right when the accident happened. He did not see the body of the
truck before he came to a stop.

He finds nothing in this evidence or in the circumstances of
the case which would justify one taking any other position
against the defendant's right of the evidence. The fact that the
Judge saw and heard the witness, and that there is no line of
case where the opinion of the jury and the trial judge would be
final.

The judgment will be affirmed.

FOR THE DEFENDANT,

O'Connor, J., and Llewellyn, J., concur.

41362

WILLIAM J. KEHL,

Appellee,

v.

APPEAL FROM

MUNICIPAL COURT

ILLINOIS DOUGHNUT AND CAKE
COMPANY, a Corporation,

Appellant.

OF CHICAGO.

308 I.A. 318

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On trial by a jury of six, there was a verdict for plaintiff in the sum of \$768.87, on which the court overruling a motion for a new trial entered judgment, from which defendant appeals.

The suit was begun January 28, 1939. It was based on a lease of certain premises in Chicago executed and delivered by plaintiff to defendant October 20, 1933, whereby the premises were demised for a term of five years expiring October 31, 1938. The rent for the term was \$9300, payable at the rate of \$155 per month, in advance.

Defendant did not yield up possession at the end of the term but held over for 33 days, to and including December 3, 1938. The lease provided that in case of such holding over defendant would pay plaintiff "for the whole time such possession is withheld, the sum of Fifteen Dollars per day." Under this clause plaintiff in his suit claimed \$495. By the second paragraph of the lease defendant promised "that it will keep said premises in good repair, replacing all broken glass with glass the same size and quality as that broken." Under this clause plaintiff claimed for items designated as cleaning the fire box and ash box of the boiler, \$10; for replacing burned out grates and installation of new parts, \$62.70; for replacement of broken glass, \$25; for draining boiler and lavatory sinks, \$20; and cleaning and removing flour from the floors, \$50, a total of \$167.70. By the last paragraph of the lease defendant agreed to pay all reasonable costs and attorneys' fees and expenses that might be made and incurred in enforcing the covenants and agreements of the lease. Under this paragraph plaintiff claimed \$100. Plaintiff also claimed \$6.12 for a water bill of that amount which was unpaid. Defendant

41382

WILLIAM J. KENL,

Appellee,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

ILLINOIS DOUGHNUT AND CAKE
COMPANY, a Corporation,

Appellant.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On trial by a jury of six, there was a verdict for plaintiff in the sum of \$752.87, on which the court overruling a motion for a new trial entered judgment, from which defendant appeals.

The suit was begun January 28, 1939. It was based on a lease of certain premises in Chicago executed and delivered by plaintiff to defendant October 30, 1937, whereby the premises were demised for a term of five years expiring October 31, 1938. The rent for the term was \$9300, payable at the rate of \$155 per month, in advance. Defendant did not yield up possession at the end of the term but held over for 33 days, to and including December 3, 1938. The lease provided that in case of such holding over defendant would pay plaintiff "for the whole time such possession is withheld, the sum of Fifteen Dollars per day." Under this clause plaintiff in his suit claimed \$495. By the second paragraph of the lease defendant promised "that it will keep said premises in good repair, replacing all broken glass with glass the same size and quality as that broken." Under this clause plaintiff claimed for items designated as cleaning grates and installation of new parts, \$22.70; for replacement of broken glass, \$25; for draining boiler and lavatory sinks, \$20; and cleaning and removing flour from the floors, \$50, a total of \$117.70. By the last paragraph of the lease defendant agreed to pay all reasonable costs and attorneys' fees and expenses that might be made and incurred in enforcing the covenants and agreements of the lease.

Under this paragraph plaintiff claimed \$100. Plaintiff also claimed

admits this item is due. These items constituted the whole sum of \$768.87, which was the amount of the verdict and the judgment. The jury allowed every item claimed.

Defendant challenges the item of \$495 for holding over occupancy. It says the claim is unwarranted; that the allowance of \$15 per day is by way of penalty rather than for liquidated damages. Plaintiff testified that the actual rental value for the time held would be \$275 per month, while evidence offered by defendant tended to show that the rental value of the premises was not more than the amount reserved in the lease, namely, \$155 per month. Defendant claims that recovery on this item should have been limited to that amount,

The premises were used in manufacturing food products and bakery goods and were improved by a brick building. The property was industrial. The building had three floors. The dimensions of the of the ground floor and the second floor were fifty by one hundred feet. The first floor was of concrete; the second and third floors of maple lumber. The front of the building was of pressed brick. It was equipped with a low pressure steam plant with unit blowers and radiators and an electric elevator. The building was about twelve years old with the exception of one story which was about six years old.

The principal question in the case is whether the provision for paying \$15 per day was an agreement for the payment of liquidated damages or for a penalty. If liquidated, plaintiff was then entitled to recover \$495 on account of that item. If not liquidated but a penalty, plaintiff was limited to recover the reasonable value of the premises, which could not have been under the evidence more than \$275 per month. The statement in the lease is, of course, not conclusive but is to be determined by all the facts and circumstances tending to prove the actual intent of the parties. Advance Amusement Co. v. Franke, 268 Ill. 579; Ludlow Valve Mfg. Co. v. City of Chicago, 181

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The principal question in the case is whether the provision for paying \$15 per day was an agreement for the payment of liquidated damages or for a penalty. If liquidated, plaintiff was then entitled to recover \$495 on account of that item. If not liquidated but a penalty, plaintiff was limited to recover the reasonable value of the premises, which could not have been under the evidence more than \$275 per month. The statement in the lease is, of course, not conclusive but is to be determined by all the facts and circumstances tending to prove the actual intent of the parties. Advance Agreement Co. v. Tripp, 208 Ill. 573; Leaf Valve Mfg. Co. v. City of Chicago, 181

Ill. App. 388. The courts favor a construction which excludes the idea of liquidated damages and permits the parties to recover only the actual damages which have been sustained. Iroquois Furance Co. v. Wilkin Mfg. Co., 181 Ill. 582; O. M. White v. Mandel Bros., 248 Ill. App. 313; Joseph H. Beuttas v. Edward A. Garvey, 270 Ill. App. 310.

The difficulty of computing the damages (Weiss v. U. S. Fidelity, 300 Ill. 11), the manifest intention of the parties (B. & R. Brewing Co. v. Modzelewski, 269 Ill. 539), the question of whether the provision is free from oppression or unconscionability (Paramount Pictures Distributing Co. v. Gehring, 283 Ill. App. 581), are all important factors in deciding whether such a provision will be construed as a penalty or liquidated damages. When we consider the nature of this property, the testimony which appears in the record tending to show what the intention of the parties was and remember the burden of proving a stipulation for liquidated damages to be a penalty is upon the opposing party, we hold the jury was justified in finding this provision to be one for liquidated damages.

The verdict as to items for alleged repairs for which defendant was held liable are not so satisfactory. The lessee was not held by the paragraph of the lease cited to make extraordinary repairs, nor could he under any circumstances be held liable for any condition of the premises at the time of the surrender of the same which was the result of "ordinary wear and tear." Streeter v. Streeter 43 Ill. 155; Kagan v. Gillette, 269 Ill. App. 311. The record here shows that plaintiff was the owner of thirty-five different buildings and that he maintained a maintenance crew which was kept at work on this and other buildings. Mr. Lohrenz was in charge of this service. He testifies to a claim for \$10 for removing ashes and \$20 for draining boiler and lavatory sinks. These were not, we hold, "repairs" within the meaning of this paragraph of the lease. \$62.70 is charged for replacing burned-out grates and installation of new parts. There is no evidence tending to show that the burning out of the grates was

Ill. App. 388. The courts favor a construction which excludes the idea of liquidated damages and permits the parties to recover only the actual damages which have been sustained. Illinois Finance Co. v. Wilkin Mfg. Co., 181 Ill. 582; O. M. White v. Mandel Bros., 248 Ill. App. 313; Joseph H. Bantus v. Edward A. Garvey, 270 Ill. App. 310. The difficulty of computing the damages (Wells v. U. B.

Fidelity, 300 Ill. 11), the manifest intention of the parties (B. & B. Brewing Co. v. Modzelewski, 269 Ill. 529), the question of whether the provision is free from oppression or unconscionability (Paramount Pictures Distributing Co. v. Gehring, 263 Ill. App. 581), are all important factors in deciding whether such a provision will be construed as a penalty or liquidated damages. When we consider the nature of this property, the testimony which appears in the record tending to show what the intention of the parties was and remember the burden of proving a stipulation for liquidated damages to be a penalty is upon the opposing party, we hold the jury was justified in finding this provision to be one for liquidated damages.

The verdict as to items for alleged repairs for which defendant was held liable are not so satisfactory. The lease was not held by the paragraph of the lease cited to make extraordinary repairs, nor could he under any circumstances be held liable for any condition of the premises at the time of the surrender of the same which was the result of "ordinary wear and tear." Streeter v. Streeter, 43 Ill. 155; Kaan v. Gillette, 269 Ill. App. 311. The record here shows that plaintiff was the owner of thirty-five different buildings and that he maintained a maintenance crew which was kept at work on this and other buildings. Mr. Lohrens was in charge of this service. He testifies to a claim for \$10 for removing ashes and \$20 for draining boiler and lavatory sinks. These were not, we hold, "repairs" within the meaning of this paragraph of the lease. \$30.00 is charged for replacing burned-out grates and installation of new pipes. There

other than ordinary wear and tear, in which case defendant was not liable. As to the broken glass, the evidence fails to show that this condition existed at the time defendant vacated the premises. As to cleaning and removing flour from the floors of the building, the lease shows it was rented to be used as a bakery, and the evidence does not disclose that the floors were in any unusual condition when the nature of the business for which the premises were rented is given consideration.

The evidence as to the actual cost of making these repairs is also unsatisfactory. It indicates for the most part the work was done by plaintiff's own maintenance crew. These items amounting to \$167.70 should not have been allowed.

The whole amount due to plaintiff was the item of \$495 for occupancy during the hold over period and the amount due for the water bill admitted to be \$6.12, making a total of \$501.12, exclusive of attorneys' fees.

As to the attorneys' fees, plaintiff's attorney testified that he wrote a letter to defendant about plaintiff's claim and he explained in detail his services in court in connection with the suit. He further said that in his opinion a reasonable amount for his services would be \$100. In view of the finding of this court as to the amount due and the disallowance of many of the items for which plaintiff sued, we are disposed to hold that \$50 would be reasonable compensation. This makes a total sum of \$551.12, which we find to be the amount plaintiff is entitled to recover. If plaintiff, within ten days from the filing of this opinion, will remit from the judgment the sum of \$217.75, it will be affirmed, otherwise reversed and remanded for another trial.

AFFIRMED UPON REMITTITUR; OTHERWISE
REVERSED AND REMANDED FOR ANOTHER
TRIAL.

O'Connor, P.J., and McSurely, J., concur.

other than ordinary wear and tear, in which case defendant was not liable. As to the broken glass, the evidence fails to show that this condition existed at the time defendant vacated the premises. As to cleaning and removing floor from the floors of the building, the lease shows it was rented to be used as a bakery, and the evidence does not disclose that the floors were in any unusual condition when the nature of the business for which the premises were rented is given consideration.

The evidence as to the actual cost of making these repairs is also unsatisfactory. It indicates for the most part the work was done by plaintiff's own maintenance crew. These items amounting to \$187.70 should not have been allowed.

The whole amount due to plaintiff was the item of \$455 for occupancy during the hold over period and the amount due for the water bill admitted to be \$8.12, making a total of \$501.12, exclusive of attorneys' fees.

As to the attorneys' fees, plaintiff's attorney testified that he wrote a letter to defendant about plaintiff's claim and he explained in detail his services in court in connection with the suit. He further said that in his opinion a reasonable amount for his services would be \$100. In view of the finding of this court as to the amount due and the disallowance of many of the items for which plaintiff sued, we are disposed to hold that \$50 would be reasonable compensation. This makes a total sum of \$551.12, which we find to be the amount plaintiff is entitled to recover. If plaintiff, within ten days from the filing of this opinion, will remit from the judgment the sum of \$217.75, it will be affirmed, otherwise reversed and remanded for another trial.

APPROVED UPON REHEARING: OCTOBER 15
REVEREND AND HONORABLE THE JUSTICE
TRIAL

41053

PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOHN S. RUSCH, Appellee,

v.

JOSEPH LEVEY, SYDNEY BANK and
HAROLD BURMEISTER, Appellants.

APPEAL FROM COUNTY

COURT, COOK COUNTY.

308 I.A. 319

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The respondents, who served as judges of election in the third precinct of the 24th ward of Chicago in the primary election held April 12, 1938, have been tried and found guilty of contempt of court by Judge Edmund K. Jarecki, judge of the County court of Cook county, for alleged misbehavior as such primary judges. Sydney Bank and Harold Burmeister, who acted as Republican judges, and Joseph Levey, who acted as Democratic judge, were each sentenced to serve one year in the county jail. They appeal and with other alleged errors argue that the trial judge by reason of personal interest was disqualified from hearing the charges against them.

This opinion is filed concurrently with the opinion of the First Division of this court in case No. 40896, People of the State of Illinois ex rel. John S. Rusch v. Cunningham et al. The facts bearing upon the disqualification of the trial judge in this case are identical with the facts in case No. 40896. We are in accord with the conclusion reached in that case as to the disqualification of the trial judge and for the reasons therein stated the judgments against the respondents in this case will be reversed and their causes remanded with directions that the same be assigned for trial to another judge.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

41053

PROSECUTION OF THE STATE OF ILLINOIS
EX REL. JOHN E. FROST,

Defendant,

v.

JOSEPH L. HAYES, Attorney General,
HAROLD H. HARRIS, et al.,

Plaintiffs.

MR. JUSTICE GULLIVER DELIVERED THE OPINION OF THE COURT.

The respondents, who served as judges of election in the third precinct of the North ward of Chicago in the primary election held April 12, 1932, have been tried and found guilty of conspiracy of court by Judge Edmund K. Janewski, Judge of the County Court of Cook County, for alleged misbehavior as such primary judges. Joseph Bank and Harold Harmeister, who acted as deputy judges, and Joseph Hevey, who acted as Democratic judge, were each sentenced to serve one year in the County Jail. They appeal and also other alleged errors argue that the trial judge by reason of personal interest was disqualified from giving the verdict against them.

This opinion is filed concurrently with the opinion of the First Division of this court in case no. 40907, People of the State of Illinois ex rel. John E. Frost v. Joseph L. Hayes, et al. The facts being upon the disqualification of the trial judge in this case are identical with the facts in case no. 40907. The law in connection with the conclusion reached in that case as to the disqualification of the trial judge and for the reasons therein stated are judgments against the respondents in this case will be reversed and their names removed with allegations that the same be assigned for trial to another judge.

Friend, L. J., and Newman, J., concur.

3081 A. 313

CLERK OF COURT,
JUDICIAL DEPARTMENT

41195

MAX BLAKE, a minor, by
MAX F. BLAKE, his father and
guardian,

Appellee,

v.

JEANETTE COURTNEY,

Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

308 I.A. 319²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On September 24, 1937, plaintiff, then nine years of age, collided with an automobile owned and operated by defendant while he was crossing Kedzie avenue north of 21st street in Chicago and was injured. In a tort action brought in his name by his father and guardian to recover damages from defendant the jury returned a verdict for \$3,000 upon which the court entered judgment and this appeal by defendant followed.

Kedzie avenue is a paved street running north and south, in the center of which are both north and south bound street car tracks. South of 21st street Kedzie avenue declines downward and under the C. B. & Q. railroad tracks. North of 21st street and on the east side of Kedzie avenue there is first a bakery at the northeast corner, then a tavern, then a meat market or empty store, a paint store, two houses and then the elevated railroad structure. The distance from the corner to the elevated structure is approximately 175 feet.

Defendant, a teacher in the Chicago public schools for about ten years, was driving north on the east side of Kedzie avenue in her 2-door Ford sedan in the early afternoon on the day of the accident. The weather was clear and the streets were dry. She had as passengers Mr. Rudolph Hajicek, vice president of the Lawndale National Bank, who sat in the front seat beside her, and Mr. Frederick A. Fucik, principal of the Pope school, where defendant taught. Miss Courtney, the defendant, had intended to

4195

MAX BLANK, a minor, by
MAX F. BLANK, his father and
Guardian,
Appellee,

v.

JEANETTE COUNTRY,
Appellant.

308 T.A. 419

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On September 24, 1937, plaintiff, then nine years of age, collided with an automobile owned and operated by defendant while he was crossing Kedzie Avenue north of 1st street in Chicago and was injured. In a tort action brought in his name by his father and guardian to recover damages from defendant the jury returned a verdict for \$3,000 upon which the court entered judgment and this appeal by defendant followed.

Kedzie Avenue is a paved street running north and south in the center of which are both north and south bound street car tracks. South of 1st street Kedzie Avenue declines downward and under the C. & N. W. railroad tracks. North of 1st street and on the east side of Kedzie Avenue there is first a bakery at the northeast corner, then a tavern, then a meat market or empty store, a paint store, two houses and then the elevated railroad structure. The distance from the corner to the elevated structure is approximately 175 feet.

Defendant, a teacher in the Chicago Public Schools for about ten years, was driving north on the east side of Kedzie Avenue in her 2-door Ford sedan in the early afternoon on the day of the accident. The weather was clear and the streets were dry. She had as passengers T. Rudolph Hatzick, vice president of the Lawdale National Bank, who sat in the front seat beside her, and Mr. Frederick A. Frolik, principal of the rope school, where

stop at the elevated station north of 21st street to allow Mr. Hajicek to take an elevated train. Somewhere between 21st street and the elevated structure plaintiff, who was bound on an errand for his sister, proceeded to cross Kedzie avenue toward the west and either collided with or was struck by defendant's car. Immediately after the accident he was taken by defendant in her car to St. Anthony's hospital for medical attention and remained about a week or ten days. Thereafter he was confined to his home for several weeks under the care of a physician.

Except for the time and place of the accident and the fact that plaintiff was injured the testimony of the witnesses for the respective parties is hopelessly conflicting. Plaintiff had been playing with some other boys on the east side of Kedzie avenue when his sister gave him a quarter to purchase a loaf of bread at the A. & P. store located on the west side of the street, just north of 21st street. Plaintiff testified that there were no automobiles parked on the east side of Kedzie avenue in front of the bakery or tavern, and that as he started to cross Kedzie avenue to the west from in front of the tavern he stopped at the curb, looked to his left, saw no cars parked there and no traffic approaching from the south. He started to cross the street, came to about a foot from the northbound Kedzie avenue street car track, again looked to his left, and then for the first time saw defendant's automobile close upon him. He turned to the right, was struck by the automobile, and then remembered nothing until he was in the hospital. It is plaintiff's theory that he failed to see defendant's automobile approaching from the south because of the decline of Kedzie avenue under the C. B. & Q. viaduct, and that if defendant had been traveling at a lawful rate of speed plaintiff would have crossed in safety.

Defendant presents an entirely different theory of the occurrence. She testified that as her automobile reached 21st

-2-

stop at the elevated station north of 12th Street to allow
Mr. Hattick to take an elevated train. Conversation between the
street and the elevated was not plain, and was heard on an
avenue for his sister, proceeded to cross 12th Street toward
the west and either collided with or was struck by defendant's
car. Immediately after the accident he was taken by defendant in
her car to St. Anthony's Hospital for medical attention and re-
mained about a week or ten days. Defendant he was confined to
his home for several weeks under the care of a physician.
Except for the time and place of the accident and the
fact that plaintiff was injured the testimony of the witnesses
for the respective parties is hopelessly conflicting. Plaintiff
had been playing with some other boys on the east side of 12th
avenue when his sister gave him a quarter to purchase a loaf of
bread at the A. & P. store located on the west side of the street,
just north of 12th Street. Plaintiff testified that there were no
automobiles parked on the east side of 12th Avenue in front of
the bakery or tavern, and that he started to cross 12th Avenue
to the west from in front of the tavern he stopped in the curb,
looked to his left, saw no cars parked there and no traffic approach-
ing from the south. He started to cross the street, came to about
100 feet from the northeast corner where 12th Street crosses 12th Avenue,
to his left, and then for the first time saw defendant's automobile
close upon him. He turned to the right, was struck by the automobile
and then remembered nothing until he was in the hospital. It is
plaintiff's theory that he failed to see defendant's automobile
approaching from the south because of the location of 12th Avenue
under the C. & N. Viaduct, and that if defendant had been traveling
at a lawful rate of speed plaintiff would have crossed in safety.
Defendant presents an entirely different theory of the
occurrence. He testified that as he was crossing 12th Street

street she slowed down to a stop or almost a stop in order to permit a truck coming from the west on 21st street to turn into Kedzie avenue toward the north; that there was a street car immediately in front of the truck, and that she followed the street car and truck at a rate of approximately 18 or 20 miles an hour, intending to stop at the elevated structure, which was less than 200 feet north from 21st street; that at a point between the tavern and the empty store located on the east side of Kedzie avenue and north of 21st street, plaintiff ran from between two parked cars at the east curb and bumped directly against the right hand side of her automobile; that plaintiff was never in front of her car, and it was not until she and her two passengers heard a bump or thud on the right hand side of the automobile that they became aware that anything unusual had happened. Defendant testified that she stopped her automobile at a car's length distance after the accident; that when her two passengers got out of the car plaintiff had picked himself up from the street and was running back to the east curb; that Mr. Fucik followed plaintiff and led him back to defendant's car, placed him in the front seat beside defendant, and that he was then driven by her to the hospital.

Plaintiff's complaint had charged defendant with negligence and with wilful and wanton misconduct, and the case was allowed to go to the jury upon both these charges. After a careful examination of the record, we are of opinion that the verdict was against the manifest weight of the evidence on the question of negligence. There is nothing in the record upon which the jury could have predicated a finding of wilful and wanton misconduct. Because the cause will have to be retried we refrain from commenting in detail on the evidence, and express no views on the question of liability.

Complaint is leveled at an instruction given on behalf of plaintiff and the refusal of one tendered by defendant. We deem it unnecessary to discuss these instructions at length since any error

street she slowed down to a stop or almost a stop in order to permit a truck coming from the west on First Street to turn into Kadzie Avenue toward the north; that there was a street car immediately in front of the truck, and that she followed the street car and truck at a rate of approximately 18 or 20 miles an hour, intending to stop at the elevated structure, which was less than 200 feet north from First Street; that at a point between the tavern and the empty store located on the east side of Kadzie Avenue and north of First Street, plaintiff ran from between two parked cars at the east end and drove directly against the right hand side of her automobile; that plaintiff was never in front of her car, and it was not until she and her two passengers heard a bump or thud on the right hand side of the automobile that they became aware that anything unusual had happened. Defendant testified that she stopped her automobile at a certain distance after the accident; that when her two passengers got out of the car plaintiff had picked himself up from the street and was running back to the east curb; that Mr. Smith followed plaintiff and led him back to defendant's car, placed him in the front seat beside defendant, and that he was then driven by her to the hospital. Plaintiff's complaint had charged defendant with negligence and with willful and wanton misconduct, and the case was allowed to go to the jury upon both these charges. After a careful examination of the record, we are of opinion that the verdict was against the manifest weight of the evidence on the question of negligence. There is nothing in the record upon which the jury could have based a finding of willful and wanton misconduct. Because the court will have to be retried we refrain from commenting in detail on the evidence, and express no views on the question of liability. Complaint is levied as an instruction given on behalf of plaintiff and the refusal of one tendered by defendant. We deem it unnecessary to discuss these instructions as lengthening any error

that may have been committed by the court in connection therewith is not likely to be repeated. The only other ground urged for reversal is that the verdict of the jury was excessive. Since the case will have to be retried it will serve no useful purpose to review the evidence as to the nature or extent of plaintiff's injuries or to comment thereon.

We think justice will be best served by another trial and therefore the judgment of the Circuit court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan and Sullivan, JJ., concur.

that may have been committed by the court in connection with the trial is not likely to be repeated. The only other ground urged for reversal is that the verdict of the jury was excessive, hence the case will have to be retried. It will serve no useful purpose to review the evidence as to the nature or extent of plaintiff's injuries or to comment thereon.

We think justice will be best served by another trial and therefore the judgment of the Circuit court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CASE REMANDED.

Scanlan and Sullivan, JJ., concur.

41468

S. EDWARD BLOOM,
Appellant,

v.

GUY A. RICHARDS et al.,
Receivers of CHICAGO RAILWAYS
COMPANY, a corporation, and HARVEY
B. FLEMING et al., as receivers of
CHICAGO CITY RAILWAY COMPANY,
CALUMET & SOUTH CHICAGO RAILWAY
COMPANY, and the SOUTHERN STREET
RAILWAY COMPANY, corporations,
doing business as CHICAGO SURFACE
LINES,

Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

308 I.A. 320

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his amended statement of claim in the Municipal court of Chicago to recover upon a claim for an attorney's lien, predicated upon a contract in writing, wherein one Nora McCarthy is alleged to have engaged plaintiff as an attorney to prosecute her claim for damages arising out of the negligence of defendants. The trial court having sustained the motion of defendants to strike the amended statement of claim, and plaintiff having refused to plead further, the court dismissed the suit and entered judgment in behalf of defendants and against plaintiff and directed the issuance of an execution for defendants' costs. Plaintiff appeals from the order and judgment thus entered.

Plaintiff's amended statement of claim alleges in substance that he is a duly licensed attorney at law in the State of Illinois and has practiced in this state for more than five years; that February 2, 1940, by a certain instrument in writing, Nora McCarthy engaged and employed him to represent her in and about the presentation and prosecution of her claim for personal injuries sustained by her and arising out of the negligence of defendants, and a copy of the agreement is attached as an exhibit to the amended statement of claim. It is further alleged that under this agreement plaintiff was to receive a sum equal to one-third of whatever amount he re-

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Staffing

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1. ~~RECEIVED BY THE DIRECTOR OF THE BUREAU OF THE ARMY~~
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• 2011

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

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When, protected upon a contract in which the

Company is alleged to have entered into an agreement to

procedures for claims for damages resulting out of the negligence of

1. The first group of students is the "Control Group". This group is made up of students who are not taking any special classes or programs. They are the baseline for comparison.

...to strike the ...

10-10-68

[illegible]

177-178

1. *Journal of the American Medical Association*, 1997; 277: 1039-1043.

Small, square, white, round tablets with "M" and "N" on opposite sides.

1944-1945

Flow and pressure in the right ventricle and pulmonary artery

her and riding out of the neighborhood of Belmont, and a copy of

This agreement is subject to the approval of the Board of Directors of the Company.

Yakulov, Ivanovskiy and others had been working on the same problem for a long time.

covered or realized upon the claim of Nora McCarthy, whether by suit, settlement or otherwise. "(4) That on the 3rd day of February, 1940, plaintiff by reason of his said contract in writing and claiming an attorney's lien by reason thereof under and in pursuance of the statutes of the State of Illinois in such case made and provided, duly served notice of said claim, and lien, and of the contract, aforesaid, upon the defendants herein. (5) That thereafter said defendants acknowledged to him, said plaintiff, the receipt of said notice, claim, lien and contract. That thereafter and prior to the filing of the suit said Nora McCarthy effected a settlement of her said claim against said defendants [naming them] and received as consideration therefor the sum of \$500 by reason whereof there accrued to plaintiff under and in pursuance to said attorney's lien, claim and notice, the sum of \$166.66 which represents a sum equal to one-third of said settlement. That on the day and date of the making of the settlement aforesaid, the defendants notified and informed said Nora McCarthy of the service of said claim for attorney's lien, predicated upon the contract aforesaid executed and delivered by said Nora McCarthy, as aforesaid, and that thereupon, and in order to effect said settlement said Nora McCarthy agreed to and did deliver to said defendants herein a so-called surety bond wherein and whereby it was conditioned that if said defendants would pay and turn over to said Nora McCarthy said sum of \$500 said Nora McCarthy and the surety named in said bond, would, jointly and severally, hold said defendants harmless from any cause, claim, lien or damages arising out of the claim for attorney's lien of plaintiff, as aforesaid." (Italics ours.)

The sole question involved is whether plaintiff's amended statement of claim sufficiently set forth a cause of action under the Attorney's Lien Act. (Chap. 13, sec. 1, par. 14, Ill. Rev. Stats., 1939.) The statute providing for the enforcement of an

covered or treated upon the claim of such liability, whether by
any, settlement or otherwise, (4) that on the day of
February, 1940, liability by reason of the said contract in
writing and relating to the above-mentioned claim was
and in payment of the balance of the debt of liability in and
also made and provided, only after which all said claim, and
and of the contract, (5) that the contract, (6)
that the contract said defendant acknowledged to him, with claim-
ant, the receipt of said notice, claim, and contract, that
contract and prior to the filing of the said suit was
offered a settlement of her claim; that said defendant
[claim (6)] and received a consideration therefor the sum of
\$500 by reason whereof claim was paid to plaintiff under and in
pursuance to said defendant's claim and notice, the sum of
\$100.00 which represents a sum equal to one-third of said claim
went, that on the day of the filing of the said settlement
afforded, that the contract said defendant said for plaintiff
of the parties of said claim for defendant's claim, provided upon
the contract afforded executed and delivered by said defendant
as afforded, and that the contract, and in order to afford said
settlement said defendant agreed to and did deliver to said
defendant herein a so-called equity bond certain and whereby it
was conditioned, that if said defendant would pay and then over
to said defendant said sum of \$500 said contract was and the
equity bond in said bond, would, jointly and severally, hold and
defendant herein from and hence, claim, claim or damages arising
out of the claim for attorney's fees of plaintiff, as provided.
(Witness says.)
The sole person involved in contract plaintiff's account
statement of claim, defendant's and for a credit of balance
the attorney's fees of \$100.00, \$25.00, \$25.00, \$25.00, \$25.00,
\$25.00, (1937). The above providing for the settlement of an

attorney's lien provides inter alia: "*** Provided, however, such attorneys shall serve notice in writing, which service may be made by registered mail, upon the party against whom their clients may have such suits, claims or causes of action ***." It is urged by defendants and the court was evidently of opinion that plaintiff's allegations in the amended statement of claim with reference to the service of notice were insufficient, in that plaintiff failed to set forth that he "did serve, by registered mail, a notice upon this defendant, in writing, as is required by said statute, but on the contrary shows that the only notice served, if any, was one sent by ordinary United States mail to the defendants; that the provisions of such statute and section are mandatory and must be strictly followed by persons seeking a lien as provided therein." We think the court was clearly in error in sustaining defendants' motion to strike paragraphs 4 and 5, which were the salient portions of the amended statement of claim. From these paragraphs, and the succeeding parts of the amended statement of claim, it appears that plaintiff had "duly served notice of [his] claim, and lien, and of the contract, aforesaid, upon the defendants herein," and "that, thereafter, said defendants acknowledged to him *** the receipt of said notice, claim, lien and contract," and defendants even went so far, as appears from the amended statement of claim, as to "notify and inform said Nora McCarthy of the service of said claim for attorney's lien" upon them, which was predicated upon the alleged contract between Nora McCarthy and plaintiff, and that in order to effect a settlement with her they required Nora McCarthy to furnish them with a surety bond whereby it was conditioned that if defendants would pay and turn over to her \$500, she and the surety named in the bond would jointly and severally hold defendants harmless from any cause, claim, lien or damages arising out of the claim for attorney's lien of plaintiff.

It has been held, and we find no decisions to the contrary, that a statement of claim in a fourth class action under the Municipal

Court Act is not required to have the particularity of pleading at common law, but is sufficient if it contains a brief statement of the nature of the case and such further information as will reasonably inform a defendant as to a plaintiff's claim. (Johnston v. Shockey, 335 Ill. 363.) In Nicholson v. Kurzdorfer, 295 Ill. App. 617, the court said: "The rigorous requirements of common law pleading do not apply to a statement of claim (in fourth class cases in the Municipal court) and it is sufficient if the statement of claim alleges 'facts reasonably to inform the defendant of the claim against him, and that it is not necessary to state sufficient facts to make out a cause of action.'" The Attorney's Lien Act was evidently intended to protect defendants as well as those asserting a claim for a lien, and was calculated to safeguard the rights of persons against possible claims for liens where defendants were not properly notified and in fact had no actual notice that a claim for lien existed. However, it would be untenable to hold that where notice in writing had been served, received and acknowledged, and steps taken by the person against whom the lien was claimed to protect himself from possible double payment, with full knowledge of the circumstances, a technical defense such as the one here interposed should be allowed to defeat a just claim.

The only question that we are called upon to determine is whether the amended statement of claim entitled plaintiff to a hearing. We think it sets out a good cause of action and that the court was not warranted in striking portions thereof. Therefore the finding and judgment of the trial court is reversed and the cause is remanded with directions to the court to enter a rule upon defendants to file an affidavit of merits to plaintiff's statement of claim, and thereafter to proceed to hear the cause upon the merits.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

court is not required to have the jurisdiction of the court as
common law, but its jurisdiction is not limited to the nature of the
case and such further information as will be necessary to
advisory information as to a plaintiff's claim. (See, e.g.,
Hoskey, 335 Ill. 382.) In Hoskey v. Hoskey, 335 Ill. 382,
617, the court said: "The plaintiff's statement of common law
pleading do not apply to a statement of claim (in which case the
in the municipal court) and it is sufficient if the statement of
claim alleges facts reasonably to infer the defendant of the claim
against him, and that it is not necessary to state sufficient facts
to make out a cause of action." The court's view was not
duly intended to protect a defendant as well as those asserting a
claim for a lien, and was calculated to deprive the right of
persons against possible claims for liens where defendants were not
properly notified and in fact had no actual notice that a claim was
lien existed. However, it would be impossible to hold that such
notice in writing had been served, received and acknowledged, and
steps taken by the person against whom the lien was claimed to
protect himself from possible double payment, with full knowledge
of the circumstances, a voluntary payment such as the one made
interposed should be allowed to defeat a first claim.

The only question that was called upon to be decided in
whether the amended statement of claim entitled plaintiff to a
hearing. We think it was not a good cause of action and that
the court was not warranted in granting judgment thereon. There-
fore the finding and judgment of the trial court is reversed and
the cause is remanded with directions to the judge to enter a writ
upon defendants to file an affidavit of service to plaintiff's
statement of claim, and thereafter to proceed to hear the matter
upon the merits.

FORWARDED BY MAIL TO THE
COURT, CHICAGO, ILL.

Seaman and Sullivan, Attorneys, Chicago, Ill.

41535

2063 LAWRENCE AVENUE BUILDING
CORPORATION,

Appellant,

v.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

JOSEPH L. BIEDL and JULIA BIEDL,
Appellees.

308 I.A. 320²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendants to recover damages for trespass and cutting and severing six shade trees from plaintiff's land, without plaintiff's knowledge or consent. The case was tried before the court without a jury, resulting in a finding for plaintiff and the assessment of damages in the sum of \$1.00 and costs, from which plaintiff appeals, contending that the court erred in not awarding it larger damages. Defendants filed no brief on appeal.

Plaintiff corporation is the owner of property at 2063 Lawrence avenue, Chicago, which is improved with a three-story and English basement building extending from the sidewalk at the front to the alley in the rear. The building is described as an "I" shaped building, the front and rear of which run parallel to the street and alley, with an indentation of approximately four feet on each side along the center. Upon this vacant indented space there had grown numerous trees to a height of about 25 feet. These were known as "Trees of Heaven," and furnished shade to the first and second apartments.

Defendants own and reside just east of and adjoining plaintiff's premises and have a garage adjoining the vacant space upon which these trees were located. August 21, 1938, defendants entered upon plaintiff's property and cut six of these trees, which were then approximately eight years old, a foot from the ground. In its complaint plaintiff charged that defendants had wilfully and maliciously entered and trespassed upon plaintiff's premises, without

AND STATE OF NEW YORK
COUNTY OF NEW YORK

IN SENATE

v.

JOSEPH L. BIRN and JESSIE BIRN
Appellants.

3081 A. 320

THE HONORABLE JUSTICE CLERK OF THE SUPREME COURT OF THE STATE OF NEW YORK

Shall certify and cause to be entered

damages for trespass and causing and converting six acres of land from plaintiff's land, viz: about plaintiff's knowledge of common. The case was tried before the court at New York City, resulting in a finding for plaintiff and the assessment of damages in the sum of \$1.00 and costs, from which plaintiff appeals, contending that the court erred in not awarding to plaintiff damages, damages filed no brief on appeal.

Plaintiff corporation is the owner of property at 200 Lawrence Avenue, Chicago, which is improved with a three-story and English apartment building according to the records at the front to the alley in the rear. The building is described as an "L" shaped building, the front and rear of which are parallel to the street and alley, with an extension of approximately four feet on each side along the center. Upon this vacant lot stand three and four stories ten to a height of about 15 feet. These were known as "Ten of Heaven" and "Fourteen of Heaven" to the first and second apartments.

Defendants own and reside just east of and adjoining plaintiff's premises and have a vacant lot between the vacant space upon which these houses were located. August 21, 1915, defendants moved upon plaintiff's property and on six of these trees, which were then approximately eight years old, a foot from the ground, in the complaint plaintiff charged that defendants and plaintiff and wife

permission, and had cut these trees, contrary to the statute, to the damage of plaintiff in the sum of \$600.

Defendants failed to appear and in an ex parte hearing plaintiff had judgment in the sum of \$100. Subsequently, defendants, by their counsel, moved to vacate the judgment, but before agreeing to such an order plaintiff exacted and received from defendants a stipulation that Henry Clause, a landscape gardner, one of the witnesses who had testified upon the ex parte hearing, would, if present upon the second hearing, testify that the value of the trees cut down would be \$84.

Defendants then filed their affidavit of defense, wherein they denied the trespass, denied wilfully and maliciously taking from plaintiff's premises any property or trees as alleged, and also denied that plaintiff had been damaged.

Upon the hearing it appeared from the uncontroverted evidence that defendants had trespassed upon plaintiff's property and cut down six trees, as alleged in the complaint. After plaintiff had closed its case, defendants sought to abandon the defense interposed and to amend their affidavit of defense. After the court had indicated that he would reverse his ruling on the motion, defendants were permitted to introduce evidence of license and justification which was entirely at variance with the defense that they had previously interposed. No order was ever entered on the motion to amend the affidavit of defense and no amended affidavit was ever filed. On the record presented the only defense shown by the pleadings is a denial of the charges contained in the complaint. At the conclusion of the hearing the court entered a finding for plaintiff and assessed its damages in the sum of \$1.00.

Since defendants filed no brief, we are not apprised of their theory upon which the judgment should be sustained. It seems to us, however, that after entering findings in favor of plaintiff the court had no alternative except to abide by the stipulation of the parties as to the value of the trees taken. Plaintiff's counsel invoke the

particular, and that the same thing, namely, to the contrary, to the damage of plaintiff in the sum of \$100.

Defendant failed to appear and to do any other thing in plaintiff's behalf in the sum of \$100. Defendant, however, by their counsel, moved to receive the judgment and costs against to such an order plaintiff executed and received from defendant a stipulation that money claimed, a judgment entered, one of the witnesses who had testified upon the plaintiff's motion, if present upon the second hearing, testify that the value of the trees was about \$500.

Defendant then filed a motion for judgment, claiming that they denied the charges, denied liability and defendant's taking from plaintiff's property any property or trees as alleged, and also denied that plaintiff had been damaged.

Upon the hearing it appeared from the undisputed evidence that defendant had transferred upon plaintiff's property and cut down six trees, as alleged in the complaint. After plaintiff had closed its case, defendant sought to introduce evidence tending to prove that the value of the trees was less than the amount claimed, and to show that the value of the trees was less than the amount claimed. It was held that the evidence was not sufficient to establish that the value of the trees was less than the amount claimed, and that the plaintiff was entitled to recover the full amount claimed.

The second hearing was held on the 12th day of the month, and the plaintiff presented the only evidence in the case. The defendant, however, failed to appear and to do any other thing in plaintiff's behalf in the sum of \$100. Defendant, however, by their counsel, moved to receive the judgment and costs against to such an order plaintiff executed and received from defendant a stipulation that money claimed, a judgment entered, one of the witnesses who had testified upon the plaintiff's motion, if present upon the second hearing, testify that the value of the trees was about \$500.

Defendant then filed a motion for judgment, claiming that they denied the charges, denied liability and defendant's taking from plaintiff's property any property or trees as alleged, and also denied that plaintiff had been damaged.

Upon the hearing it appeared from the undisputed evidence that defendant had transferred upon plaintiff's property and cut down six trees, as alleged in the complaint. After plaintiff had closed its case, defendant sought to introduce evidence tending to prove that the value of the trees was less than the amount claimed, and to show that the value of the trees was less than the amount claimed. It was held that the evidence was not sufficient to establish that the value of the trees was less than the amount claimed, and that the plaintiff was entitled to recover the full amount claimed.

The second hearing was held on the 12th day of the month, and the plaintiff presented the only evidence in the case. The defendant, however, failed to appear and to do any other thing in plaintiff's behalf in the sum of \$100. Defendant, however, by their counsel, moved to receive the judgment and costs against to such an order plaintiff executed and received from defendant a stipulation that money claimed, a judgment entered, one of the witnesses who had testified upon the plaintiff's motion, if present upon the second hearing, testify that the value of the trees was about \$500.

provisions of Par. 435 of the criminal code. (Chap. 38, sec. 201, Ill. Rev. Stats., 1939), which provides in substance that whoever wilfully and maliciously cuts down, destroys or otherwise injures any shrub, vine or tree, for ornament or use, shall be subjected to a jail sentence or fine, or both, and "shall be liable to the person injured in double the amount of the damages done." However, since the parties stipulated that \$84 would be the value of the trees, we are not inclined to give heed to the contention that this sum should be increased.

Since the case was tried without a jury, it would serve no useful purpose to remand it for another hearing. There is substantially no dispute as to the salient facts. The judgment of the Municipal court is reversed and judgment is entered here in favor of plaintiff and against defendants for \$84 and costs.

JUDGMENT REVERSED AND JUDGMENT HERE FOR
PLAINTIFF AND AGAINST DEFENDANTS IN THE
SUM OF \$84.

Scanlan and Sullivan, JJ., concur.

40786

NELLIE M. CONERTY,
(Plaintiff)

Appellee,

RICHARD J. RICHTSTEIG et al.,
Defendants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

RICHARD J. RICHTSTEIG and
MARIE RICHTSTEIG,
(Defendants)

Appellants.

308 I.A. 321

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A foreclosure proceeding. The cause was referred to a master in chancery, who recommended a decree of foreclosure and sale, and found, inter alia, that defendants Richard J. Richtsteig and Marie Richtsteig, his wife, and Hecht Nielsen were personally liable to plaintiff for the amount of any deficiency. Thereafter, on March 2, 1939, a decree confirming the master's report of sale and distribution and adjudicating a deficiency was entered by the court. The decree contains the following:

"And it further appearing to the Court that in and by the said former decree of foreclosure and sale heretofore entered herein, it was provided that in the event the proceeds of any such Master's sale should be insufficient to pay the plaintiff's indebtedness in full and that there should be any deficiency in such proceedings, that the plaintiff should be entitled to a personal deficiency decree against Richard J. Richtsteig and Marie Richtsteig, his wife, and Hecht Nielsen, who were and are personally liable therefor;

"And it further appearing to the Court from said report that the proceeds of said sale were insufficient to pay the amount due the plaintiff, Nellie M. Conerty under said former decree, together with the fees, disbursements and commissions of said Master and the costs

40786

WILLIAM J. (Plaintiff)

vs.

RICHARD J. KENNEDY and
WILLIAM J. KENNEDY (Defendants)

RICHARD J. KENNEDY and
WILLIAM J. KENNEDY (Defendants)

WILLIAM J. KENNEDY (Plaintiff)

18081.A.821

THE FOLLOWING IS THE VERDICT OF THE COURT:

A foreclosing proceeding. The court has ordered that

the property be sold at public auction to the highest bidder

and the proceeds of the sale be distributed to the parties

as follows: to the plaintiff, the sum of \$10,000.00

and to the defendants, the sum of \$5,000.00

and the balance of the proceeds of the sale to be

distributed to the parties as follows:

Court. The court has ordered that

the property be sold at public auction to the highest bidder

and the proceeds of the sale be distributed to the parties

as follows: to the plaintiff, the sum of \$10,000.00

and to the defendants, the sum of \$5,000.00

and the balance of the proceeds of the sale to be

distributed to the parties as follows:

to the plaintiff, the sum of \$10,000.00

and to the defendants, the sum of \$5,000.00

and the balance of the proceeds of the sale to be

distributed to the parties as follows:

to the plaintiff, the sum of \$10,000.00

and to the defendants, the sum of \$5,000.00

of this proceeding, and that there is still due the plaintiff the sum of \$5,442.42, and that the defendants, Richard J. Richtsteig and Marie Richtsteig, his wife, and Hecht Nielsen, are personally liable to the plaintiff therefor;

"It Is Further Ordered, Adjudged and Decreed, that the defendants, Richard J. Richtsteig and Marie Richtsteig, his wife, and Hecht Nielsen pay to the plaintiff the amount of said deficiency, to-wit: The sum of \$5,442.42 with interest thereon from February 21, 1939, the date of said Master's sale, and that the plaintiff may have execution thereon as upon a judgment at law."

The Richtsteigs (hereinafter called defendants) appeal from that portion of the aforesaid decree decreeing that they were personally liable to plaintiff for the amount of the deficiency.

The material facts are not in dispute. On July 1, 1920, Richard J. Richtsteig purchased the property at the northeast corner of Congress and Sangamon streets, Chicago, for \$15,000. As part payment for the same he and Marie, his wife, executed their promissory note for \$9,000, dated July 1, 1920, due July 1, 1925, with interest at the rate of six per cent per annum. To secure payment of this note defendants executed a trust deed on the property, which contained, inter alia, the following provision: "The grantors covenant and agree * * * to pay said indebtedness, and the interest thereon, as herein and in said Notes provided, or according to any agreement extending time of payment." (Italics ours.) On February 26, 1923, defendants sold the property to Hecht Nielsen for \$18,000. On June 24, 1925, prior to the maturity of the note, the payment of the same was extended by an agreement between the agent for the owner of the note and Hecht Nielsen and his wife for a period of five years, that is, until July 1, 1930. On June 7, 1930, the payment of the note was again extended by agreement between said agent and Hecht Nielson, a widower, for a period of five years, that is, until July 1, 1935,

of this proceeding, and that there is still an outstanding
the sum of \$2,442.42, and that the defendant, Richard J.
Nichols and his wife, Elizabeth, his wife, and their children,
are personally liable to the plaintiff company.
"It is further ordered, adjudge and decreed, that the
defendant, Richard J. Nichols and his wife, Elizabeth, his wife,
and each shall pay to the plaintiff the amount of said debt-
agency, to-wit: The sum of \$2,442.42 with interest thereon from
February 12, 1933, the date of said debt's sale, and that the
plaintiff may have execution thereon as upon a judgment of law."
The Nicholses (hereinafter called defendants) appeal
from that portion of the aforesaid decree holding that they were
personally liable to plaintiff for the amount of the debt-
agency. The material facts are set forth below. On July 1, 1932,
Richard J. Nichols purchased the property at the northeast
corner of Congress and Madison streets, Chicago, for \$15,000.
As part payment for the same he had cash, his wife, Elizabeth,
their promissory note for \$2,000, dated July 1, 1932, and July 1,
1933, with interest at the rate of six per cent per annum. He
secured payment of this note by means of a trust deed on
the property, which contained, inter alia, the following provi-
sions: "The grantors covenant and agree to pay said interest
others, and the interest thereon, as herein and is well noted
provided, or extended to any extension extending time of payment
(Article 6). On February 26, 1933, defendant sold the property
to Westfield for \$15,000. On June 24, 1933, prior to the
maturity of the note, the payment of the same was extended by an
agreement between the grantors for the term of six months and months
Nichols and his wife for a period of five years, that is, until
July 1, 1936. On June 7, 1934, the payment of the note was again
extended by agreement between said agent and Westfield, a
further, for a period of five years, that is, until July 1, 1939.

and interest was paid on the note until July 1, 1936. As the principal was not paid on said date, plaintiff filed her instant suit. Edward LeTourneux, the original owner of the note, sold the same to plaintiff when it first matured, on July 1, 1925. LeTourneux acted as the agent for plaintiff in the matter of the first and second extensions of the note. Defendants introduced evidence to the effect that after they sold the property to Nielsen, on February 26, 1923, no one at any time communicated with them in reference to the loan; that they had nothing to do with the property after that date; that they were not asked to make any payment of principal or interest after that date; that no one communicated with them in reference to the two extensions of the note; that the first time they learned that the principal remained unpaid was when they were served with summonses in this cause, on September 11, 1936; that plaintiff is a resident of Chicago, and defendants resided in Evanston; that on June 24, 1925, the date of the first extension agreement, the fair and reasonable value of the real estate, including the improvements thereon, was about \$18,000 to \$20,000; that at the time of the foreclosure the value of the property had greatly depreciated and the estimated value of the same was \$8,000; that upon the foreclosure sale of the property it was bought by plaintiff for \$6,000; that the first and second extension agreements provided that interest should be paid at the rate of six and one-half per cent per annum.

Defendants contend that the extension of the mortgage indebtedness was without their consent and that they were therefore released from personal liability, and that the trial court erred in decreeing that they were personally liable for the deficiency.

Plaintiff concedes that a mortgagor is released from personal liability when the mortgage is extended by agreement between the mortgagee and the grantee of the mortgagor without the consent of the mortgagor, but she contends that "the provisions of the mortgage whereby the mortgagors consented in advance to the terms of any extension

and interest was paid on the note until July 1, 1915. At the time
 capital was not paid on said note, plaintiff filed her claim with
 Edward Lawrence, the original owner of the note, and the same was
 plaintiff's first action, on July 1, 1915. Defendant's action
 as the agent for plaintiff in the matter of the first note was
 extensions of the note, defendant's intention was to pay off
 that after they sold the property to William, on January 25, 1915,
 no one at any time communicated with them in reference to the loan,
 that they had nothing to do with the property after that date; that
 they were not asked to make any payment or interest on interest
 that date; that no one communicated with them in reference to the
 extensions of the note; that the first time they learned that the
 principal remained unpaid was when they were served with summons
 this cause, on September 11, 1915; that plaintiff is a resident of
 Chicago, and defendant resided in Chicago, last on June 15, 1915,
 the date of the first extension agreement, the first and defendant
 value of the two notes, including the improvement thereon, was
 about \$15,000 to \$20,000; that at the time of the first extension the
 value of the property had greatly depreciated and the balance due
 of the same was \$8,000; that upon the foreclosure sale of the
 property it was bought by plaintiff for \$4,000; that the first and
 second extension agreements provided that interest should be paid at
 the rate of six and one-half per cent per annum.
 Defendant contends that the extension of the mortgage loan
 agrees was without their consent and that they are therefore released
 from personal liability, and that the trial court erred in finding
 that they were personally liable for the debt.
 Plaintiff contends that a mortgage is retained from person
 liability when the mortgage is extended by agreement between the
 payee and the lender of the mortgage without the consent of the
 mortgagor, but she contends that the provision of the mortgage
 by the mortgagor consented in advance to the issue of any extension

agreement prevents an extension given by the mortgagee to the grantee of the mortgagors from operating as a discharge of the personal liability of the mortgagors;" that "express consent to the terms of the extension agreements was given by the following clear and unqualified language [in the trust deed]: 'The grantors covenant and agree * * * (1) to pay said indebtedness and the interest thereon as herein and in said notes provided, or according to any agreement extending time of payment.'" The contention of plaintiff has been heretofore sustained by decisions of the third division of this court, as well as by a decision of this division. The case of Brosius v. Madsen, 297 Ill. App. 94, involved the foreclosure of a mortgage made by Earl L. Weinstock and Adeline M. Weinstock, which contained the following provision: "That the grantors covenant and agree to pay said indebtedness and the interest thereon as herein and in said note provided, or according to any agreement extending time of payment." The property was conveyed by the Weinstocks to Carl O. Madsen and Tina Madsen and the payment of the note was extended by agreement between the Madsens and the holder of the note but without the knowledge or consent of the mortgagors, and the Madsens assumed the payment of the mortgage debt. The Weinstocks contended that the extension of the mortgage without their knowledge or consent discharged them from their liability to the mortgagee. The court said (pp. 98-101):

"The liability assumed by the mortgagors when they signed the trust deed depends largely on the words used in the instrument. At the time the mortgagors executed the trust deed, as we have already pointed out, it provided among other provisions relating to the transaction that - 'The grantors covenant and agree to pay said indebtedness and the interest thereon as herein and in said note provided, or according to any agreement extending time of payment.'

"The words used in the agreement did not restrict the extension of the mortgage loan, and by such restriction relieve the defendants, Earl L. Weinstock and Adeline M. Weinstock as the makers of the

agreement provides an extension given by the mortgagee in the event of the mortgagee from operating as a trustee of the interest in the property of the mortgagee; that "express consent to the terms of the extension agreement was given by the following clear and unambiguous language [in the first deed]: 'The grantor covenants and agrees to pay said indebtedness and the interest thereon as herein set forth in said notes provided, or according to any agreement extending time of payment.'"

The contention of plaintiff has been heretofore sustained by decision of the third division of this court, as well as by decision of this division. The case of Proctor v. Proctor, 277 Ill. App. 2d, involved the foreclosure of a mortgage made by Earl A. Proctor and defined E. A. Proctor, which contained the following provision: "That the grantor covenants and agrees to pay said indebtedness and the interest thereon as herein set forth in said notes provided, or according to any agreement extending time of payment." The property was conveyed by the witnesses to Earl A. Proctor and the latter the payment of the note was extended by agreement between the witnesses and the holder of the note but without the knowledge or consent of the mortgagee, and the witness assumed the payment of the mortgage debt. The witness contended that the extension of the mortgage without their knowledge or consent discharged them from their liability to the mortgagee. The court said (pp. 27-28):

"The liability assumed by the mortgagee was that they agreed the trust deed should operate largely on the whole tract in the instrument. It was clear the mortgage extended the trust deed, as we have already pointed out, it provided a new estate relating to the extension and that - 'The grantor covenants and agrees to pay said indebtedness and the interest thereon as herein set forth in said notes provided, or according to any agreement extending time of payment.'"

"The words used in the agreement did not transfer the extension of the mortgage loan, and by such restriction relieve the defendant from liability and define E. A. Proctor as the owner of the

notes when they conveyed the title to the real estate, which was security, as evidenced by the trust deed executed by the makers at the time the deed was delivered.

"This very question has been passed upon by courts of appeal, and one of the cases that has been considered by the Appellate Court is that of Kent v. Rhomberg, 288 Ill. App. 328, which involved a trust deed, containing an agreement on the part of the mortgagor, in which the phraseology is somewhat similar to the language of the trust deed involved in this case, and in passing upon the questions called to the attention of the Appellate Court, we said:

"We are of the opinion that the reasoning in the case from which we have just quoted is applicable to the cause here on appeal. There is no language which limits or qualifies the extension of time of payment in the trust deed in question, but the words used are very broad when it appears from the trust deed that the time of payment of the indebtedness may be extended according to any agreement which might be entered into for that purpose. The language not alone applies to an extension agreement that might have been had between the plaintiff and the defendants, but applies equally well to the extension agreement entered into between the plaintiff and Williams, the successor to title of the defendants by their deed."

"From an examination of the opinion of the court, it is apparent that the language of the trust deed does not limit the number of extensions or the time when an extension agreement might be had between the plaintiff in this case and the successor in title to the defendants.

"In the case of Continental Nat. Bank & Trust Co. v. Reynolds, 286 Ill. App. 290, the court considered the necessary construction to be given the words as used in the trust deed. In the case here on appeal it was stated that - 'The grantors covenant and agree to pay said indebtedness and the interest thereon as herein and in said note provided, or according to any agreement extending time of payment.'

notes when they received the title to the real estate, and also the security, as evidenced by the fact that the notes were not paid at the time the land was delivered.

"This very question has been passed upon by courts of appeal and one of the cases cited has been considered by the Supreme Court is that of East v. East, 100 Ill. App. 3d, which involves a trust deed, containing an agreement on the part of the mortgagor, in which the mortgagor is somewhat similar to the language of the trust deed involved in this case, and in passing upon the question called to the attention of the Appellate Court, as said:

"The use of the opinion that the language in the deed from which we have just quoted is applicable to the case now on appeal. There is no language which limits or qualifies the obligation of the mortgagor in the trust deed in question, and the words used are very broad when it appears from the deed that the time of payment of the indebtedness may be extended according to any agreement which might be entered into for that purpose. The language now under consideration is an extension agreement that might be made between the mortgagor and the mortgagee, but applied equally well to the extension agreement entered into between the East and East, the case on or to title of the defendants by their deed."

"From an examination of the opinion of the court, it is apparent that the language of the deed does not limit the time of extensions or the time when an extension agreement might be made between the parties in this case and the language in title to the deed is not limited.

"In the case of East v. East, 100 Ill. App. 3d, the court considered the mortgagee's obligation to give the words as used in the trust deed. In this case now on appeal it was stated that - 'The mortgagee's obligation and duty to pay said indebtedness and the interest thereon as herein and in said note provided or agreed upon in the mortgage and the note of payment.'

In discussing the construction of the word 'any,' this court in the above cited case said:

"* * * We have carefully examined the authorities cited by plaintiff holding in effect that the use of the word "any" in the phrase "any agreement," etc., was in its usual broad distributive sense, indicating lack of limitation and as the equivalent of, and synonymous with, the words "each" or "every." In Bonart v. Robito, 141 La. 970 (76 So. 166), the court said that they could not conceive of any reasonable theory on which to hold that the consent, as expressed in the note sued on, authorized the payee to grant the maker only one extension of the final payment, however long, and did not authorize two extensions, however short; that to maintain such a doctrine would lead to the anomalous conclusion that the indorser would not have been released if the payee had granted to the maker of the note, without notice to the indorser, one extension of the time of payment for one year, but that the indorser would have been released by the granting of two extensions for one month, or one week, or one day each. The court there interpreted the indorser's consent that time of payment might be extended without notice to mean that the payee and the maker of the note could agree to extend the payment from time to time without notice to the indorser and without releasing the indorser from liability, unless and until at any time after maturity the indorser saw fit to pay the note and become immediately subrogated to the right of action against the maker. Plaintiff cites Webster's International Dictionary; Bouvier's Law Dictionary, and numerous cases in Illinois and other States supporting the argument that the word "any" as employed in connection with the note herein is used in its usual sense to indicate the equivalent of "each" or "every." (People v. VanCleave, 187 Ill. 125, 134; People v. Fidelity & Casualty Co., 153 Ill. 25, 36; West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 179; State Nat. Bank of Ft. Worth v. Vickery (Tex. Com. App.), 206 S. W. 841). After a careful consideration of these authorities we have reached the

conclusion that "any extension" as here used should not receive the narrow interpretation sought to be placed on the language thus employed, but should rather be interpreted in the ordinary sense of "each" and "every" extension, without limited numbers. If the parties had intended to limit the right of the holder of the note to grant time they could easily have expressed their intention by using other language, such as "an extension," or "one extension," or have placed a time limit on the authority of the holder to extend.'

"Applying the construction given the word 'any' as used in connection with the agreement signed by the makers of the trust deed, as well as the notes, the defendants agreed they would pay the indebtedness and the interest thereon according to any agreement entered into by the holders of title extending the time of payment. So we are of the opinion that the court did not err in entering the deficiency appearing in the record against the defendants here on appeal.

"While it is true the Madsens as successors in title to these defendants assumed payment of the mortgage, still by their assumption, failure to pay did not release Earl L. Weinstock and Adeline M. Weinstock from liability."

The Supreme court denied a petition for leave to appeal in the Brosius case (297 Ill. App. xiv). The case of Continental Nat. Bank & Trust Co. v. Reynolds, 286 Ill. App. 290, referred to in the opinion in the Brosius case, was decided by this division of the court. The cases cited by defendants in support of their contention do not, in our judgment, apply to the instant case. To refer, briefly, to the cases cited: In Prudential Ins. Co. v. Bass, 357 Ill. 72, it appears from the opinion of the Supreme court (p. 74) that the mortgagors "never consented, expressly or otherwise, to the extension agreement." The court further stated (p. 77): "It is argued that the grantees agreed to pay the mortgage debt at maturity

and when and as the debt might be extended, and that therefore appellees anticipated an extension and impliedly assented thereto. The difficulty with this contention is that it is based upon a premise not shown by the record. The grantees agreed to pay the debt at maturity, but it nowhere appears that they agreed to pay it as it might be extended or that prior to maturity they even anticipated there would be any extension." In Kazunas v. Wright, 286 Ill. App. 554, the court states (p. 559): "The controlling question in the case, therefore, is whether the various agreements between the grantee owners of the equity and the holders of the notes whereby the time of payment of the same was extended without the knowledge or consent of the makers, who were mortgagors, operated to release these mortgagor makers from their liability on the notes." The court further states (p. 557) that the uncontradicted evidence showed that neither one of the defendants had knowledge of or at any time consented to the execution of the extension agreements. The defendants, by their amended affidavit of merits, alleged that the extension agreements were entered into without their knowledge or consent. In Albee v. Gross, 250 Ill. App. 98, it appears that the extension agreement was entered into without ^{the} knowledge or consent of the mortgagor. The same situation is presented in Binga v. Ball, 299 Ill. App. 361, and Douglass v. Ullsperger, 251 Ill. App. 145. We hold that the contention of defendants that the extension of the mortgage indebtedness was without their consent cannot be sustained.

Defendants contend that plaintiff "has been guilty of such laches as to preclude her from taking a personal judgment against Mr. and Mrs. Richtsteig." If we have ruled correctly as to the first point it necessarily follows that there is no merit in the instant contention. The same may be said as to the further contention that the cause of action matured against defendants on July 1, 1925, that the Statute of Limitations began to run on that date and that it expired on July 1, 1935; that as the instant suit was not commenced

until September 4, 1936, any action against defendants was barred more than a year prior to the time of the commencement of the suit.

Defendants contend that "upon execution of the extension agreement on June 24, 1925, the Kichtsteigs became sureties for the loan or occupied a relationship in the nature of sureties to the loan and the property. As such sureties they are released from liability by the change in the interest rate." While the first and second extension agreements provided that interest should be paid at the rate of six and one-half per cent instead of six per cent, as the note provided, interest was paid by the grantee of the mortgagors up to and including July 1, 1936. The note provided for payment of seven per cent interest after maturity. Plaintiff contends that by the clause in question in the trust deed defendants not only consented to an extension of the time of payment but agreed to pay the mortgage indebtedness according to any agreement extending the time of payment; that this would include a change in the rate of interest such as was made in the instant case; but she further contends that the change in the rate of interest did not result in any damage to the defendants and that therefore there is no equity in defendants' instant point. We are of the opinion that there is no substantial merit in defendants' instant contention. It will be further noted that the instant contention of defendants is based upon the assumption that upon the execution of the extension agreement on June 24, 1925, defendants became mere sureties for the loan. We have heretofore held that the extensions did not operate as a discharge of the personal liability of the mortgagors.

The decree of the Circuit court of Cook county entered March 2, 1939, is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

and on September 4, 1939, any action against defendant and her
was then a year prior to the time of the execution of the will.
Defendant's conduct was "open violation of the provisions
agreement on June 4, 1939, the defendant's conduct was a violation for the
loan or occupying a residence in the name of defendant to the
loan and the property, as well as the fact that she received from the
defendant by the change in the interest rate." While the first and
second extension agreements provided that interest should be paid
at the rate of six and one-half per cent interest on six per cent,
as the note provided, interest was paid by the payment of the note
agrees up to and including July 1, 1939. The note provided for pay-
ment of seven per cent interest after maturity. Plaintiff contends
that by the clause in question in the first extension agreement and the
occurred to an extension of the time of payment was agreed to pay
the mortgage indebtedness according to any agreement extending the
time of payment; that this would include a change in the rate of
interest such as was made in the extension agreement and the further con-
tains that the change in the rate of interest was not made in any
agreement to the defendant and that therefore there is no change in
defendant's interest point. As one of the parties that there is no
substantial injury to defendant's interest caused by it will be
further noted that the interest consideration of defendant is based
upon the stipulation that upon the execution of the extension agree-
ment on June 24, 1939, defendant's conduct was a violation for the loan
to have heretofore paid with the defendant's and not operate as a
change of the personal liability of the mortgagee.
The terms of the circuit court of Cook County entered order
5, 1939, is affirmed.

WILLIAM W. WILSON,

Plaintiff, v. J. J. and William J. Jones,

40915

CHARLES J. BERTHOLD et al.,
Appellants,

v.

N. P. SEVERIN et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

308 I.A. 321²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action on a statutory bond executed under the mechanic's lien law of Kansas. The case was tried by the court and there was a finding and decree in favor of plaintiffs and against defendants in the sum of \$416,90. Plaintiffs appeal.

The decree finds:

- "1. That * * * [the court] has jurisdiction of the parties and the subject matter;
- "2. That N. P. Severin and A. N. Severin, copartners doing business as N. P. Severin Company, entered into a contract in writing dated June 6, 1935, with The Board of Education of the City of Kansas City, of the State of Kansas, for the making of a certain public improvement, to-wit: the construction of the Wyandotte High School in Kansas City, Kansas;
- "3. That in connection therewith the said N. P. Severin Company as principals, executed two bonds each in the penal sum of \$1,308,000.00 and the Defendants, Royal Indemnity Company, of New York City, New York, a corporation, Globe Indemnity Company, of New York City, New York, a corporation, The Fidelity & Casualty Co. of New York, a corporation, American Surety Company of New York, a corporation, Hartford Accident and Indemnity Company, of Hartford, Connecticut, a corporation, United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation and Fidelity and Deposit Company of Maryland, of Baltimore, Maryland, a corporation, executed both said bonds as sureties thereon and designated in the said bonds are the respective amounts thereof to which the liability of the respective sureties are limited, said bonds are designated

CHARLES J. ...
v.
E. P. ...

3081.A.321

This is an action on a promissory note ...
mechanic's lien law of Kansas. The case was tried by the court
and there was a finding and decree in favor of plaintiff and
against defendant in the sum of \$11,321.34, plaintiff's costs.

The decree finds:

- "1. That ... (the court) has jurisdiction of the parties
and the subject matter;
- "2. That E. P. ... and ...
business as E. P. ... entered into a contract in writing
dated June 6, 1935, with the ... of the city of
Kansas City, of the State of Kansas, for the ... of a certain
public improvement, to-wit: the construction of the ...
school in Kansas City, Kansas;
- "3. That in connection ... the said ...
company as principal, executed and issued in the ...
\$1,500,000.00 and the ... local ... company, of the
city of ... a corporation, ...
New York City, New York, a corporation, ...
of New York, a corporation, ...
corporation, ...
Connecticut, a corporation, ...
company, of ... a corporation and ...
deposit ... of ... a corporation,
said bonds are the respective ... thereof to whom the ...

as Statutory Bond and Performance Bond respectively;

"4. That thereafter by written contract dated November 9, 1935, the principal defendants, N. P. Severin Company, entered into a contract with one A. H. Schultz by the terms whereof said A. H. Schultz undertook and agreed to supply the necessary material and labor for the painting work on said project, which said contract was let to said A. H. Schultz upon the condition that he produce a certain release executed by Ekstrand Paint & Supply Company, a corporation;

"5. That said A. H. Schultz did produce such a release dated December 19, 1935, duly executed by said Ekstrand Paint & Supply Company, whereupon the contract between the principal defendants, N. P. Severin Company, and said A. H. Schultz, was executed by said N. P. Severin Company and delivered to said A. H. Schultz;

"6. That Ekstrand Paint & Supply Company, a corporation, was dissolved on or about December 31, 1935, and had assigned all its assets to Charles J. Ekstrand, Roy H. Ekstrand, J. Leslie Ekstrand and R. G. Erickson, as copartners doing business as Ekstrand Paint & Supply Company, and the said copartners have at the same time assumed all the liabilities of said corporation;

"7. That said Ekstrand Paint & Supply Company as a corporation and afterwards as a copartnership, have furnished materials and supplies to said A. H. Schultz for use in connection with the painting work on said Wyandotte High School in Kansas City, Kansas, and that the fair and reasonable value of said materials and supplies was \$3,066.90;

"8. That some time in March or April, 1937, there has been paid to the plaintiffs for and on behalf of said A. H. Schultz and on account of the materials and supplies so furnished the sum of \$550.00;

"9. That said A. H. Schultz has defaulted, in that he has not paid the balance due to said plaintiffs for the materials and supplies so furnished him by said plaintiffs;

"10. That the plaintiffs as such assignees of Ekstrand Paint

an attorney took the following statement:

"I, the undersigned, do hereby certify that on or about December 1, 1935, the principal defendants, J. P. Levein Company, entered into a contract with one J. B. Schuler of the same name and address as the Schuler mentioned and agreed to supply the necessary material and labor for the painting work on said project, which said contract was let to said J. B. Schuler upon the condition that the proceeds of a certain release executed by defendant J. B. Schuler, a corporation;

"That said J. B. Schuler did procure such a release on December 1, 1935, duly executed by said defendant J. B. Schuler, whereby the contract between the principal defendants, J. P. Levein Company, and said J. B. Schuler, was amended by said J. P. Levein Company and delivered to said J. B. Schuler;

"That defendant J. B. Schuler, a corporation, was dissolved on or about December 1, 1935, and the assets of said J. B. Schuler, including the assets to Charles L. Schuler, J. B. Schuler, J. B. Schuler, and J. B. Schuler, were transferred to said J. B. Schuler, and the said corporation was at the time dissolved;

all the liabilities of said corporation;

"That said defendant J. B. Schuler, a corporation, was dissolved on or about December 1, 1935, and the assets of said J. B. Schuler, including the assets to Charles L. Schuler, J. B. Schuler, J. B. Schuler, and J. B. Schuler, were transferred to said J. B. Schuler, and the said corporation was at the time dissolved;

and that the said and defendant J. B. Schuler, a corporation, was dissolved on or about December 1, 1935, and the assets of said J. B. Schuler, including the assets to Charles L. Schuler, J. B. Schuler, J. B. Schuler, and J. B. Schuler, were transferred to said J. B. Schuler, and the said corporation was at the time dissolved;

"That said J. B. Schuler, a corporation, was dissolved on or about December 1, 1935, and the assets of said J. B. Schuler, including the assets to Charles L. Schuler, J. B. Schuler, J. B. Schuler, and J. B. Schuler, were transferred to said J. B. Schuler, and the said corporation was at the time dissolved;

and that the said and defendant J. B. Schuler, a corporation, was dissolved on or about December 1, 1935, and the assets of said J. B. Schuler, including the assets to Charles L. Schuler, J. B. Schuler, J. B. Schuler, and J. B. Schuler, were transferred to said J. B. Schuler, and the said corporation was at the time dissolved;

& Supply Company, a corporation, have thereupon entered this suit against these defendants upon the Statutory Bond herein referred to;

"11. That by virtue of the release executed by Ekstrand Paint & Supply Company, a corporation, said plaintiffs have released the defendants of any and all claims and demands for materials and supplies furnished to said A. H. Schultz in connection with said work to the amount of \$2,000.00 over and above all sums paid to said plaintiffs for and on account of said A. H. Schultz:

"Wherefore, the Court finds that there is due the plaintiffs the sum of \$3,066.90 less \$2,550.00, or a balance of \$416.90."

The decretal part of the decree is as follows:

"It Is, Therefore, Ordered, Adjudged and Decreed that judgment be and hereby is entered for the plaintiffs, Charles J. Ekstrand, Roy H. Ekstrand, J. Leslie Ekstrand and R. C. Erickson, doing business as Ekstrand Paint & Supply Company, and against the defendants, N. P. Severin and A. N. Severin, doing business as N. P. Severin Company, Royal Indemnity Company, a corporation, Globe Indemnity Company, a corporation, The Fidelity & Casualty Company of New York, a corporation, American Surety Company of New York, a corporation, Hartford Accident and Indemnity Company, a corporation, United States Fidelity and Guaranty Company, a corporation, and Fidelity and Deposit Company of Maryland, a corporation, for the sum of \$416.90 for which sum execution may issue."

Plaintiffs claim that Schultz purchased all of the material required by his contract with Severin from plaintiffs, and that plaintiffs were entitled to \$4,753.87 for said materials so furnished; that Schultz paid on account \$550, and that plaintiffs were entitled to a decree for \$4,203.87, with five per cent interest from April 1, 1937

Defendants have filed the following cross-errors: "(a) The trial court was without jurisdiction of the subject matter. (b) The bond sued upon and set forth by plaintiffs' complaint does not give plaintiffs a right of action thereon," and they contend that the cross-errors should be sustained, that the judgment of the trial court

should be reversed, and the cause remanded with instructions that the suit be dismissed. We find no merit in the cross-errors. Defendants further contend that if we are of the opinion that there is no merit in the cross-errors, nevertheless, the judgment of the trial court should be affirmed because it is "amply supported by the evidence."

Plaintiffs contend that "the court refused to hear competent, relevant and material evidence offered by the plaintiffs and received and considered incompetent, irrelevant and immaterial evidence offered by the defendants."

Ekstrand Company, Severin Company and Schultz had been doing business with one another over a long period of time. Severin Company is engaged in the general contracting and building business, with its principal office in Chicago. Schultz is a painting contractor located in Chicago. Plaintiffs are jobbers and wholesalers of paint, varnish, wallpaper and allied products, in Chicago. After Severin Company had entered into the contract with the Board of Education of the city of Kansas City, and had given a statutory bond, it entered into a contract with Schultz, a subcontractor, by the terms of which Schultz was to do the painting on the job for the sum of \$14,950, and it was provided in said contract that Schultz should purchase the materials to be used by him from plaintiffs. The contract further provided that "the Subcontractor agrees to secure from the Ekstrand Paint & Supply Company a release issued for the benefit of the Contractor by the Ekstrand Paint & Supply Company, which will waive the right of any claim for materials furnished by the Ekstrand Paint & Supply Company up to a total amount of \$2,000." That the Ekstrand Company furnished all the materials and supplies to Schultz in connection with the painting work on the high school is not controverted: in fact, the decree so finds. After Schultz had made the contract with plaintiffs it was found that plaintiffs could not ship materials from Chicago because the Kansas City labor unions demanded

should be reversed, and the cases remanded with instructions that the writ be dismissed. We find no merit in the defendant's contention that it is one of the opinion that there is no merit in the cross-errors, notwithstanding the judgment of the trial court should be affirmed because it is "fully supported by the evidence."

Plaintiffs contend that "the court refused to hear competent relevant and material evidence offered by the plaintiffs and relative and considered incompetent, irrelevant and immaterial evidence offered by the defendants."

Hastings Company, Lumber Company and Schmitz had been doing business with one another over a long period of time. Hastings Company is engaged in the general contracting and building business, with its principal office in Chicago. Schmitz is a painting contractor located in Chicago. Plaintiffs are painters and decorators of paint, varnish, wallpaper and allied products, in Chicago. Hastings Company had entered into the contract with the Schmitz of location of the city of Kansas City, and had given a check for \$14,950, and into a contract with Schmitz, a subcontractor, by the terms of which Schmitz was to do the painting on the job for the sum of \$14,950, and it was provided in said contract that Schmitz should, because the materials to be used by him from plaintiffs. The contract further provided that "the subcontractor agrees to secure from the Hastings Paint & Supply Company a release issued for the benefit of the Contractor by the Hastings Paint & Supply Company, which will give the right of any claim for materials furnished by the Hastings Paint & Supply Company up to a total amount of \$14,950." That the Hastings Company furnished all the materials and supplies to Schmitz in connection with the painting work on the high school is not controverted; in fact, the decree so finds. After Schmitz had made the contract with plaintiffs it was found that plaintiffs could not ship materials from Chicago because the Kansas City labor union demanded

that the materials be supplied by local concerns. Plaintiffs then made agreements with The Sherwin-Williams Co., Hunn-Letton Paint Co., and Cook Paint and Varnish Co., all of Kansas City, to supply the painting materials required by Schultz to fulfill his contract with Severin. These three concerns furnished practically all of the materials required and used by Schultz. The three firms billed plaintiffs for the materials furnished and plaintiffs paid for the same. The agreement between Schultz and plaintiffs was an oral one and was made by Roy Ekstrand, representing plaintiffs, and Schultz in a certain conversation. When Ekstrand was upon the stand plaintiffs' counsel attempted to prove by the witness the conversation. The trial court sustained a general objection to the proposed proof. Thereupon plaintiffs' counsel attempted to prove the fair, customary market value of the materials furnished at the time and place in question. The court sustained a general objection to the introduction of such evidence. By the court's rulings plaintiffs were deprived of an opportunity to prove the agreed price of the materials actually used on the job, and were further deprived of an opportunity to prove the fair and reasonable value of the materials so used. That evidence as to the agreement between Schultz and plaintiffs should have been admitted is plain. The views of the trial court in making his ruling may be gathered from the record. At one point the court stated that if a price of \$4,753.88 was agreed upon by plaintiffs and Schultz for the materials furnished that would not "tie the defendant up." The court further stated that plaintiffs could only collect what the Kansas City firms charged them for the materials; that plaintiffs "can collect only the amount they have been damaged. Damage is compensatory." During the examination of the witness Ekstrand the following occurred: "The Court: But you never touched this material, did you? Witness: No, sir. Q. It never came into your possession? A. No, but we were responsible for it. Q. It was only a question of bookkeeping with you? A. We were responsible for it. Q. Responsible for what? A. For payment of the bills. Mr. England [counsel

that the materials be supplied by local sources. Plaintiff's
made agreement with the defendant, and the defendant
and took said and various, all of which it is to supply the
painting materials required by plaintiff to fulfill his contract with
defendant. These items were furnished pursuant to all of the
materials required and used by plaintiff. The items were billed
plaintiff for the materials furnished and plaintiff paid for the
same. The agreement between plaintiff and defendant was an oral one
and was made by the defendant, representing plaintiff, and defendant
in a certain conversation. When plaintiff was asked the same ques-
tion, plaintiff attempted to prove by the witness the conversation.
The trial court sustained a general objection to the proposed proof.
Thereupon plaintiff's counsel attempted to prove the fact, testimony
market value of the materials furnished at the time and place in
question. The court sustained a general objection to the introduction
of such evidence. By the court's ruling plaintiff was deprived of
an opportunity to prove the market value of the materials furnished
used on the job, and was further deprived of an opportunity to prove
the fair and reasonable value of the materials so used. This evidence
as to the agreement between plaintiff and defendant should have been
admitted in plain. The view of the trial court in ruling the ruling
may be gathered from the record. It was found that plaintiff paid
if a price of \$4,775.00 was agreed upon by plaintiff and defendant for
the materials furnished that would not be the case. The court
court further stated that plaintiff could only collect what the
Lafayette City firm charged them for the materials, and plaintiff
"can collect only the amount they have been charged, and is
comparatively." During the testimony of the witness, however, the
following occurred: "The Court: But you never located this material,
did you? Plaintiff: No, sir. Q. It never came into your possession
A. No, but we were responsible for it. Q. It was only a question
of bookkeeping with you? A. We were responsible for it. Q. Defendant

for plaintiffs]: You paid Munn-Letton? The Court: There was a bond here given to the state that fixed the responsibility for the payment of the bill. Witness: We are jobbers and wholesale dealers. That is our regular business and we buy goods from manufacturers and sell them at the jobbers' price. The Court: All right. I'm just asking these questions — *** I am satisfied that in this contract there is no provision for any profits. It is a guarantee to pay the expenses, to pay the cost of the materials as delivered. * * * Mr. England: * * * Schultz was a subcontractor and he had to go out and buy the materials some place else and contract for them. The Court: And he can't charge for any more. * * * Well it is too bad that you did not have three or four middle men to charge through. Then, you might have had a bill here. Mr. England: No. But the contract provides that Schultz should buy from Ekstrand. He could not go out any place and buy. He would violate his contract if he did. The Court: I don't think there is anything in the contract that allows this type of testimony to stand. You may save your point." As the trial court refused to allow plaintiffs to prove their contract with Schultz, we must assume that the trial court, in referring to "the contract," had in mind the contract between Severin and Schultz. The court overlooked, apparently, the fact that plaintiffs were suing to recover upon their contract with Schultz. Their whole case rested upon that contract. The trial court committed serious and prejudicial error in refusing to allow plaintiffs to prove the agreement between them and Schultz. We may add that we find nothing in the record to warrant the conclusion of the trial court that plaintiffs were not entitled to a profit upon the materials furnished. The court, in reaching this conclusion, again had in mind the Severin-Schultz contract. Had the trial court allowed the testimony offered by plaintiffs to be given defendants would have had the undoubted right to show any fraud, collusion, accident or mistake in the matter of the agreement between plaintiffs and Schultz.

Defendants offered in evidence the following instrument:

for plaintiff's bill. Two bills were submitted. The court then was asked
 have given to the state board the responsibility for the payment
 of the bill. Witness on one occasion was asked whether or not
 is our regular contract and we had paid the amount of the bill
 then at the plaintiff's bill. The court said: "I am not sure
 these questions -- I am not sure that in this contract there is
 no provision for my payment. It is a contract to pay the amount
 to pay the cost of the materials as delivered. I am not sure
 * * * whether or not a subcontractor and he had to pay the cost of the
 materials some place else and contract for them. The court said:
 he can't charge for my work. * * * will it be for the cost of the
 not have three or four months more to receive payment. The court
 what have had a bill here. He, plaintiff, has not the contract
 provides that benefits should pay from defendant. He would not be
 my place and pay. He would violate the contract if he did. The
 court: I don't think there is anything in the contract that allows
 this type of testimony to stand. You may have your bill. As the
 trial court refused to allow plaintiff to prove that contract with
 defendant, we must assume that the trial court, in refusing to "the
 contract," was in error. The contract between plaintiff and defendant
 The court overlooked, apparently, the fact that plaintiff was asked
 to recover upon their contract with defendant. Their claim was based
 upon that contract. The trial court's decision was based upon
 error in refusing to allow plaintiff to prove the agreement between
 them and defendant. We say that it is that agreed in the record to
 warrant the conclusion of the trial court that plaintiff was not
 entitled to a verdict upon the contract. The court, in
 reaching this conclusion, again was in error. The contract was not
 fact. And the trial court allowed the testimony offered by plain-
 tiff to be given without cross-examination and the defendant's right to
 show any fraud, collusion, mistake or mistake in the making of the
 agreement between plaintiff and defendant.

"RELEASE.

"Know All Men By These Presents, that Ekstrand Paint & Supply Company, a corporation of Chicago, Illinois, for and in consideration of the sum of One Dollar, and other valuable considerations, receipt of which are hereby acknowledged, agrees to furnish and ship to A. H. Schultz, for use in the execution of a contract for the painting and finishing of the Wyandotte High School, Kansas City, Kansas, materials as required by said contract and conforming to the requirements thereof in the value of Two Thousand Dollars.

"The undersigned further agrees to and does hereby waive and release any and all claims or right of liens on the Wyandotte High School, Kansas City, Kansas, and does further release N. P. Severin Company and its Sureties and the Owner of the Wyandotte High School, Kansas City, Kansas, of all claims and demands whatsoever to the amount of Two Thousand Dollars, over and above the reasonable value of all materials paid for by either N. P. Severin Company or A. H. Schultz on account of labor or materials, or both, furnished, or which may be furnished by the undersigned for the said building.

"Given under our hand and seal this 19th day of December, 1935.

"Ekstrand Paint & Supply Company

"By Charles J. Ekstrand
"President

"(Corporate Seal)

"Attest:

"R. G. Erickson
"Secretary"

(Here follows an acknowledgment before a notary public.)

Plaintiffs objected to the introduction of this instrument upon the ground that it was vague, indefinite, ambiguous and uncertain. The trial court in overruling the objection stated that he understood what the release meant. The instrument, considered alone, is, in our judgment, so ambiguous in its terms that its meaning cannot be determined. Plaintiffs have argued, with some force, that the release is absolutely void for uncertainty, ambiguity

"Now all that is left to be done is to have the
 Company, a corporation of Illinois, for and in consideration
 of the sum of \$100,000, and other valuable consideration, to be
 of which the money advanced, agreed to furnish the sum of \$100,000.
 It is further, for use in the execution of a contract for the purchase
 and finished of the property of the Company, Kansas City, Kansas,
 materials as required by said contract and conforming to the re-
 quirements stated in the value of the property advanced."

"The undersigned further agrees to and does hereby give and
 release any and all claim or right of title in the property of
 Kansas City, Kansas, and does further release to the undersigned
 company and its successors and assigns all the property of the
 Kansas City, Kansas, of all claims and demands whatsoever for the
 amount of two hundred dollars, over and above the reasonable value
 of all materials paid for by either party, to be paid by the
 undersigned an amount of labor or materials, or both, furnished, or
 which may be furnished by the undersigned for the said building,
 which shall not exceed the sum of \$100,000, and shall be paid at once."

1933.

"Witness my hand and seal this 1st day of January."

"By Charles J. [Name]
 President"

"(Corporate Seal)"

"Witness"

"W. J. [Name]
 Secretary"

(This follows an acknowledgment before a notary public.)

"Witness is objected to the introduction of this instrument
 upon the ground that it is vague, indefinite, ambiguous and uncer-
 tain. The trial court in overruling the objection stated that the
 instrument was the result of a contract. The instrument, considered
 alone, is, in our judgment, so ambiguous in its terms that its
 meaning cannot be determined. Witnesses have argued, with some
 force, that the value is ascertainable for uncertainty, but it is

and lack of mutuality, but we are not inclined to hold that the release is necessarily a void instrument. Upon another trial of the cause the parties will have an opportunity to show, if they can, by extrinsic evidence, the meaning of the release. If the extrinsic evidence is contradictory the trial court will have the right to determine the question of fact. The trial court, in holding that the release was not ambiguous, erred, to the serious prejudice of plaintiffs.

The decree of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

DECREE REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

and lack of ability, but we are not inclined to hold that the
release is necessarily a void statement. Upon another point of
the cause the parties will have an opportunity to show, it may
can, by extrinsic evidence, the meaning of the release. If the
extrinsic evidence is contradictory the trial court will have the
right to determine the question of fact. In this regard, in
holding that the release was not binding, there is the serious
prejudice of plaintiffs.

The degree of the operation cause of loss cannot be reversed
and the cause is remanded for a new trial.

WILLIAM L. BROWN AND SONS
ATTORNEYS AT LAW
CHICAGO, ILL.

Friend, P. J., and Sullivan, J., concur.

41448

SIMON ALTMAN,

Appellee,

v.

APPEAL FROM CIRCUIT COURT,

PAUL A. CORSO, trading under
the name and style of ROYAL
SMART SHOE COMPANY,
Appellant.

COOK COUNTY.

308 I.A. 322

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order granting plaintiff, Simon Altman, a judgment for \$975.26 against defendant, Paul A. Corso, trading under the name and style of Royal Smart Shoe Company.

Plaintiff filed a complaint for the construction of a consignment contract entered into between the parties, alleging that he was induced to enter into said contract on the representation that at the expiration of the contract any unsold merchandise was to be returned by him to defendant and that certain moneys deposited by him with defendant were to be held as a trust fund by the latter for the sole purpose of insuring the payment of the consigned merchandise, and that upon his return of the unsold merchandise the money then in said trust fund was to be turned over to him. The complaint concluded with a prayer that the court in construing the contract determine that "there is no duty upon the plaintiff to repurchase the unsold consigned merchandise" and that "in any event the court restrain the defendant from forfeiting unto himself the trust fund in his possession in the sum of \$888.05 or any other sum whatsoever." Defendant's answer averred that the contract was clear, definite and unambiguous and denied generally the allegations of the complaint.

Upon the hearing the contract was received in evidence and the parties entered into the following stipulation:

"IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys, as follows:

SINGH ALAM, Plaintiff,

v.

PAUL A. CORSO, Trading Agent,
the name and style of
SINGH ALAM COMPANY,
Defendant.

308 L.A. 332

MR. JUSTICE SULLIVAN DELIVERED THE DECISION OF THE COURT.

This is an appeal from an order granting judgment.

Simon Singh, a defendant for 1977, is a defendant in this

P. CORSO, trading agent, has come and style of Singh Alani, the
Company.

Plaintiff filed a complaint for the enforcement of a

consignment contract entered into between the parties, alleging

that he was induced to enter into said contract on the representation

that the contract was for the sale of goods and that the defendant

was to be returned by him to the plaintiff and that the defendant

deposited by him at the defendant's bank the sum of \$10,000.

by the latter for the sale of goods and that the defendant of the

consignment merchandise, and that upon his return of the merchandise

merchandise the money was not returned to him and he was induced to

to him. The defendant admitted that he received the money from

contracting the contract defendant said "there is no duty upon the

plaintiff to repurchase the goods consigned merchandise, and that

"in any event the court has in the defendant's favor and that the

himself the first time in his possession in the sum of \$10,000, and

any other sum whatsoever." Defendant's answer denied that the

contract was oral, definite and unambiguous and denied generally

the allegations of the plaintiff.

Upon the hearing the court was assisted by evidence and

the parties entered into the following stipulation:

"IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN THE

"1. That on February 28, 1938, the contract between the parties, dated March 1, 1937, was terminated.

"2. That on said date of February 28, 1938, the plaintiff had in his possession merchandise totalling the sum of \$3,092.36, which he refused to purchase from defendant, and returned to the defendant merchandise totalling the sum of \$2,265.36, the balance having been retained in escrow by plaintiff, by agreement of the parties, as security only awaiting the termination of this suit.

"3. That on February 28, 1938, the defendant held for the account of plaintiff \$879.85, under the agreement in question, which the defendant claims belongs to him as damages on account of shop worn or depreciated merchandise, because of plaintiff's refusal to purchase the entire stock of merchandise that he had in his possession on February 28, 1938, totalling the sum of \$3,092.36.

"4. That the question presented is as follows: Is defendant entitled to any damages on account of plaintiff's refusal to purchase the entire stock of merchandise that he had in his possession at the termination of said contract, because of shop-worn merchandise and depreciation of said merchandise, in accordance with paragraph 14 of said contract?

"5. That plaintiff maintains that under the contract in question he is not obligated to pay to defendant any damages for shop-worn and depreciated merchandise on account of his refusal to purchase the stock of merchandise on hand.

"6. That defendant maintains that plaintiff was obligated under the contract to pay damages to the defendant for shop-worn and depreciated merchandise on account of his refusal to purchase the merchandise, and the defendant is entitled to retain the said sum of \$879.85.

"7. That in the event the Court determines that defendant is entitled to damages, then the parties agree that defendant's actual damages for shop-worn and depreciated merchandise are \$879.85, regardless of whether paragraph 14 is construed to be a penalty or not.

"8. That if the Court determines that plaintiff was not obligated to pay to defendant any damages on account of his refusal to purchase said merchandise, then plaintiff is entitled to the return of said \$879.85, provided, however, that plaintiff delivers to defendant all shoes that were placed with him in escrow pursuant to agreement.

"9. That in the event the Court determines that plaintiff was obligated to pay to defendant damages on account of his refusal to purchase said merchandise, it is agreed by the parties hereto that said damages shall be in the amount of \$879.85, and defendant will be entitled to retain the \$879.85, and plaintiff will be required to return to the defendant all of the merchandise retained by him in escrow.

"10. That this Court shall retain jurisdiction for the purpose of enforcing any order, judgment or decree entered by the Court."

On March 1, 1937, plaintiff, a retail shoe dealer, and defendant, a wholesale shoe dealer, entered into a written contract

"1. That on February 25, 1938, the defendant, William J. ...
... and a sum of \$1,000.00, was received.

"2. That on said date of February 25, 1938, the defendant ...
... had an his possession ...
... which he refused to ...
... defendant ...
... having been ...
... parties, as ...

"3. That on February 25, 1938, the defendant ...
... account of ...
... which the ...
... shop worn ...
... refusal to ...
... in his possession on February 25, 1938, ...
\$3,000.00.

"4. That the ...
... defendant ...
... to purchase the ...
... possession of the ...
... worn ...
... once with ...

"5. That ...
... question he is not ...
... shop-worn and ...
... to purchase the ...

"6. That ...
... under the contract ...
... and ...
... the ...
sum of \$275.00.

"7. That in the ...
... is entitled to ...
... actual ...
... regardless of ...

"8. That ...
... listed to pay ...
... purchase ...
of a ...
... returned all ...
to ...

"9. That in the ...
... was ...
... to purchase ...
that ...
will be ...
caused to ...
by his ...

"10. That ...
... purpose of ...
Court."

on March 1, 1939, ...

defendant ...

which provided, among other things, that defendant consign a stock of shoes to plaintiff for the period of one year. The contract contained the usual consignment provisions that title to the shoes remain in defendant and that plaintiff at stated periods would pay defendant for such shoes as he sold the difference between the wholesale price and the retail sale price. The contract also provided that plaintiff upon the initial shipment of merchandise make a deposit of \$750 with defendant to be held by the latter as a trust fund as security for the consigned merchandise, this fund to be augmented with payments by plaintiff of twenty-five cents for each pair of certain shoes sold by him. When the contract terminated on February 28, 1938, plaintiff had in his possession merchandise on consignment from defendant having an invoice value of \$3,092.36 and defendant held as a trust fund to plaintiff's account \$879.85, which included the \$750 originally deposited by plaintiff and later deposits aggregating \$129.35 at the rate of twenty-five cents per pair upon the sale of certain shoes. By agreement of the parties plaintiff returned all the consigned merchandise to defendant except shoes having an invoice value of \$879.85, which was placed in escrow pending the outcome of this litigation. Paragraph 14 of the contract provides:

"It is further mutually agreed that in case of any default or breach of this agreement on the part of the consignee or in the event consignor may incur or be obliged to pay attorney's fees or any other costs because of the failure, whether through insolvency, bankruptcy, assignment, or other default, of the consignee to fully comply with the conditions and provisions of this agreement in any respect, or in the event the consignee shall refuse at the time of the termination of this agreement to purchase from the consignor merchandise which he may have in his possession, the said consignor, because of the impossibility to determine his damages because of shop-worn merchandise or depreciation of said merchandise, shall retain all moneys deposited in said trust fund as and for his liquidated damages." (Italics ours.)

It will be noted that under the stipulation of the parties the only question presented is whether defendant "is entitled to any damage on account of plaintiff's refusal to purchase the entire stock of merchandise that he had in his possession at the termination of said contract, because of shop-worn merchandise and depreciation of said

merchandise, in accordance with paragraph 14 of said contract."

It will be further noted that it was stipulated "that in the event the Court determines that defendant is entitled to damages, then the parties agree that defendant's actual damage for shop-worn and depreciated merchandise is \$879.85."

In view of the fact that it is agreed that defendant suffered actual damages, at least to the extent of the \$879.85 on deposit with him, because the consigned merchandise in plaintiff's hands upon the termination of the contract was "shop-worn and depreciated," it is difficult to understand how the foregoing italicized portion of paragraph 14 could be construed to mean anything other than what it plainly states.

The contract clearly states that "in the event the consignee shall refuse at the time of the termination of this agreement to purchase from the consignor merchandise which he may have in his possession, the said consignor, because of the impossibility to determine his damages because of shop-worn merchandise or depreciation of said merchandise, shall retain all moneys deposited in said trust fund as and for his liquidated damages."

Plaintiff charges in his complaint that he was induced to enter into the contract because of certain representations made to him. Not a particle of evidence was offered to show any inducements or representations other than those contained in the written contract itself nor was any evidence offered as to any understanding or intent beyond the terms of the agreement. It has been repeatedly held that the cardinal rule in construing written contracts is to give effect to the intention of the parties as expressed in the language employed in the contract. (Miltimore v. Ferry, 171 Ill. 219; Kimball v. Custer, 73 Ill. 389; Hayes v. O'Brien, 149 Ill. 403.) In Doneyer v. O'Connell, 364 Ill. 467, the court said at p. 470: "The rules concerning the construction of contracts are so well established as to require but brief attention. The object of construction is to ascer-

merchandise, in an invoice with description of said merchandise, it will be found that it was shipped from the event the Court determined that defendant is entitled to damages then the parties agree that defendant's actual damage was \$10,000.00 and represented merchandise is \$10,000.00.

In view of the fact that it is agreed that defendant's actual damages, at least to the extent of the \$10,000.00 are deposited in him, because the defendant's merchandise in plaintiff's hands at the termination of the contract was "non-petroleum merchandise," it is difficult to understand how the foregoing finding of plaintiff's paragraph 14 could be construed to mean anything other than that it plainly states.

The contract clearly states that in the event the defendant shall refuse at the time of the termination of this agreement to pay cash from the defendant's merchandise which he may have in his possession, the said contract, because of the impossibility of recovering his damages because of short-own merchandise or merchandise of said merchandise, shall remain all money deposited in said event that as and for his liquidated damages."

Plaintiff charges in his complaint that he was induced to enter into the contract because of certain representations made to him. Not a particle of evidence was offered to show any inducement on representations other than those contained in the written contract itself nor was any evidence offered as to any representations or inducements made by the defendant. It has been repeatedly held that the cardinal rule in construing written contracts is to give effect to the intention of the parties as expressed in the language used in the contract. (Williams v. Smith, 171 Ill. 571; Marshall v. Chester, 73 Ill. 393; Smith v. Smith, 170 Ill. 401.) In Dorneyer v. Connelley, 304 Ill. 407, the Court said at p. 407: "The rule concerning the construction of contracts can be well explained as to parties but brief stated. The object of construction is to give

tain the intention of the parties. (Decatur Lumber Co. v. Crail, 350 Ill. 319.) That intention is to be determined from the language used in the instrument and not from any surmises that the parties intended certain conditions which they failed to express."

Even though it might be said that the provision of the contract under consideration was somewhat harsh or disadvantageous to plaintiff, still it must be carried out according to its terms and equity cannot create a contract for the parties different from that agreed upon by them. "We cannot construe a contract along the line of what we might believe would be a better contract for the parties to make, as equity vests no wide discretion in the chancellor such as would permit him to disturb contract rights of property." Chicago Title & Trust Co. v. Robbin, 361 Ill. 261. If it was necessary for us to so hold under the particular circumstances of this case, it is our opinion that the provision of the contract in question is neither unreasonable nor inequitable. Defendant supplied plaintiff with a stock of shoes having an invoice value of more than \$3,000. This stock was to be and was continuously replenished by defendant as shoes were sold by plaintiff and the agreement was that upon the termination of the contract unless plaintiff purchased the shoes he then had on hand he was to be liable for their depreciated and shop-worn condition to the extent of the funds he had on deposit with defendant. The damages to defendant by reason of such depreciation were to be paid with such funds. That a stock of shoes depreciates on the retailer's shelves is a matter of common knowledge. A pair of shoes, unlike many other kinds of merchandise, is repeatedly tried on and walked around in by prospective customers and in the course of time the wear and tear on same is necessarily substantial. It must also be borne in mind that plaintiff stipulated that defendant's damages by reason of depreciation were at least equal to the amount of money on deposit.

Where the language of a written contract is not ambiguous or equivocal, there is no room for construction and the contract as ex-

with the intention of the parties. (Legal opinion of the court.)
The intention is to be ascertained from the language
used in the instrument and not from the conduct of the parties
intended certain conditions which they failed to observe.
even though it might be said that the intention of the parties
under consideration was somewhat doubtful on this point.
plaintiff, still it must be decided on according to its facts and
equity cannot create a contract for the parties but must be
agreed upon by them. "The court considers a contract valid in law
of what we might believe would be a better contract for the parties
to make, as a city wants no this situation in the consideration made
as well as to him to the contract of property." (Legal opinion of the court.)
Little v. Trust Co., 101 Ill. 2d, 101 Ill. 2d, 101 Ill. 2d
to so hold under the particular circumstances of this case, it is
opinion that the provision of the contract in question is not
unreasonable nor inequitable. (Legal opinion of the court.)
stock of those having an interest in the stock of the company, that
stock was to be sold and the proceeds paid to the stockholders as
those were sold by plaintiff and the agreement was that when the
termination of the contract unless plaintiff purchased the stock as
then had on hand he was to be liable for their redemption and they
were to be paid to the extent of the funds he had on deposit with
defendant. The damages to be recovered by reason of such redemption
were to be paid with such funds. That a stock of those having an
on the retailer's shares is a matter of common knowledge. (Legal opinion of the court.)
under, unlike any other kind of redemption, is especially liable
on and asked ground in by prospective purchasers and in the course
of time the stock and the stock is necessarily sold.
must also be taken in mind that plaintiff retained the stock
and's damages by reason of redemption were at least equal to the
amount of money on deposit.
"That the language of a written contract is not conclusive of

pressed must be given effect. We find it impossible to attribute any meaning but one to the language used in par. 14 that "in the event the consignee shall refuse at the time of the termination of this agreement to purchase from the consignor *** merchandise which he may have in his possession, the said consignor shall retain all moneys deposited in said trust fund as and for his liquidated damages." "Courts do not make contracts for parties who are fully capable of making their own agreements, and if there is no ambiguity about a contract the courts cannot permit a construction contrary to its terms." Hancock v. National Council Knights & Ladies of Security, 303 Ill. 66. In Clark v. Mallory, 185 Ill. 227, the court said at p. 232:

"While courts will uniformly endeavor to ascertain the intention of the parties in construing a contract between them, and for that purpose will look into the surrounding circumstances at the time the contract was executed if the language of the instrument is ambiguous or its meaning uncertain, still when the language employed is unequivocal, although the parties may have failed to express their real intention, there being no room for construction, the legal effect of the instrument will be enforced as written."

It is not contended that plaintiff agreed to purchase the shoes in his possession when the contract terminated or that he is liable because of any breach on his part of an agreement to purchase the shoes remaining in his hands. However, plaintiff did agree to pay damages for the shopworn and depreciated condition of the shoes in his possession at the time the contract terminated unless he purchased said shoes from defendant. There was no attempt made in this case to show that defendant was guilty of misrepresentation, fraud, duress or any other wrongdoing in the procurement of the execution of the contract and it must, therefore, be enforced as written.

For the reasons stated herein the order or decree of the Circuit court is reversed and the cause is remanded with directions that an order be entered that defendant is entitled to retain the funds in his hands amounting to \$879.85 as and for his damages and that plaintiff be directed to turn over to defendant the shoes which

proposed was given effect. The fact is important in evidence
 any action may now be taken against the party in the
 event the contract shall remain in force at the expiration of
 this agreement to purchase from the contract was intended to
 he may pay in his possession, the said contract shall remain in
 always required in this kind of case and the law is settled
 damages." "It is to be noted that the contract was not fully
 capable of being made a contract, and it is to be noted that
 about a contract the court said: "The contract was not fully
 its terms." "The contract was not fully made a contract, and it
 for the fact that the contract was not fully made a contract, and it
 p. 132:

"This court will uniformly adhere to the principle that
 intention of the parties in contracting a contract is to be
 and for that purpose will look into the surrounding circumstances
 at the time the contract was made to determine the intention of the
 statement is not to be taken as a contract, and it is to be noted
 language employed is unambiguous, and it is to be noted that the
 failed to express their true intention, and it is to be noted that
 intention, the legal effect of the contract will be ascertained
 as written."

It is not necessary that a contract be made to purchase the
 goods in his possession when the contract is made or that he is
 liable because of his failure to pay for the goods to purchase
 the goods remaining in his hands. However, the contract was made to
 damages for the goods and the contract is not to be taken as a
 possession at the time the contract was made unless he purchased the
 goods from himself. There was no attempt made in this case to show
 that defendant was guilty of misrepresentation, fraud, concealment or any
 other wrongdoing in the procurement of the execution of the contract
 and it was, therefore, the contract is valid.

For the reasons stated herein the court is of the opinion that
 Circuit Court is reversed and the cause is remanded with directions
 that an order be entered that defendant is entitled to retain the
 funds in his hands according to 1875, 1876 and for his damages and
 that plaintiff be allowed to recover of defendant the sums which

he holds in escrow.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

he holds in secret.

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41288

HAZEL DORVAL,

Appellee,

v.

GUARANTEE TRUST LIFE INSURANCE COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

308 I.A. 323¹

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the amount of \$485.00 entered in the Municipal Court of Chicago against the Guarantee Trust Life Insurance Company, a corporation, and in favor of Hazel Dorval. A motion to strike the statement of defense was sustained, and the defendant having elected to stand on its affidavit of defense, judgment was entered.

The statement of claim filed by the plaintiff alleges that on the 13th day of December, 1933, the Guarantee Trust Mutual, a mutual benefit association made, executed and delivered a certificate of insurance to Joseph Alphonse Dorval, agreeing to pay to Hazel Dorval the sum of \$1,000.00 upon receipt of satisfactory proof of the death of said Joseph Alphonse Dorval; that after the execution and delivery of said certificate on, to-wit, the 7th day of October, 1936, the certificate was assumed by the Guarantee Trust Life Insurance Company, the defendant herein subject to the terms and conditions of a reinsurance contract between the said Guarantee Trust Life Insurance Company and the Guarantee Trust Mutual. It is further alleged in the statement of claim that by said certificate of assumption the amount payable to the beneficiary was limited and reduced "to the amount of insurance that the annual or monthly payment would purchase at the attained age of the insured's next birthday on the assumption date of said reinsurance contract computed according to the table of rates for each \$100.00 of insurance based on the monthly premium rate of One Dollar (\$1.00) to-wit Three Hundred Fifty Dollars (\$350.00)."; and that subsequent thereto and on the 7th day of February, 1939, Joseph Alphonse Dorval came to his death; that due and satisfactory proof of the death of the said

HALLI COMPANY
V.
GUARANTY LIFE INSURANCE COMPANY
a corporation

308 I.A. 458

MR. PRADHIN JUDGE HALLI WILLIAM THE CHIEF OF THE COURT.
This is an appeal from a judgment in the amount of \$100.00
entered in the Judicial Court of Chicago against the defendant
Life Insurance Company, a corporation, and in favor of plaintiff.
A motion to strike the statement of defense was sustained, and the
defendant having elected to stand on its affidavit of defense, judgment
was entered.

The statement of claim filed by the plaintiff alleges that
on the 15th day of December, 1935, the defendant issued to plaintiff a certain
benefit association made, executed and delivered a certificate of
insurance to Joseph Alphonse Leval, agreeing to pay to said Leval
the sum of \$100.00 upon receipt of satisfactory proof of the death of
said Joseph Alphonse Leval; that after the expiration and delivery of
said certificate on, to-wit, the 7th day of February, 1936, the certificate
was assumed by the defendant under the Insurance Company, the
defendant herein subject to the terms and conditions of a policy
contract between the said defendant and the insurance company and
the defendant first named. It is further alleged in the statement of
claim that by said certificate of association the amount payable to the
beneficiary was limited and reduced to the amount of insurance then
the annual or monthly payment would amount to the amount of the
insured's next birthday on the expiration date of said insurance
contract computed according to the date of issue of said \$100.00 of
insurance based on the monthly premium rate of the policy (\$1.00) to-wit
Three Hundred fifty dollars (\$350.00); and that defendant refused
and on the 7th day of February, 1936, Joseph Alphonse Leval came to
his death; that the said satisfactory proof of the death of the said

Joseph Alphonse Dorval was furnished to the defendant, but the defendant although often requested has wholly failed and refused to pay the proceeds of the said certificate of insurance to the plaintiff.

The Guarantee Trust Life Insurance Company, in its affidavit of defense alleges that the policy of insurance sued upon lapsed for non-payment of premiums due for the months of November and December, 1937, and that on the 31st day of January, 1938, the policy was reinstated and the following application and representations for reinstatement were made by the insured to the company:

"I hereby represent that the insured is in good health, and free from disease or ailments at the time of the reinstatement."

and further alleges that said representation was false and untrue and was made for the purpose of inducing the defendant to reinstate its policy of insurance which had heretofore lapsed for non-payment of premiums.

It is further alleged in the affidavit of defense that on the 31st day of January, 1938, and for a long time prior thereto, the plaintiff was in ill health. That from October 7, 1937, to the date of insured's death, February 7, 1939, the insured was then and there being treated by a physician for hydronephrosis, bilateral; that he was confined to the Parson Hospital, Flushing, Long Island, for hematemesis, melena, anemia, epigastric pain and had been treated for five (5) years prior thereto for ulcers of the stomach; that according to the terms and provisions of said certificate of insurance, it is provided as follows:

"This certificate, after default in payment of any assessment, may be reinstated upon the member furnishing to the association correct evidence of good health, and paying the required payment. Where the member was not in good health at the date of reinstatement, is a risk not assumed under this certificate, and, in such event, the liability hereunder may be limited to the amount of assessments paid by the member thereafter."

and that at the date of the reinstatement of said certificate of insurance insured was not in good health as above set forth and therefore was not a risk to be assumed by the defendant and that the liability of the defendant, if any there be, is the amount of assessments by it received, \$15.00, which it herewith tenders and brings into open Court;

known insurance policy was issued to the defendant, and the defendant
although often requested has wholly failed and refused to pay the
proceeds of the said certificate of insurance to the plaintiff.

The defendant issued the certificate of insurance, in its effort
to defraud the plaintiff, that the policy of insurance was not issued
for non-payment of premium but for the purpose of covering the defendant
and that on the first day of January, 1935, the policy was re-
instated and the following explanation and representation for reinstatement
were made by the insured to the company:

"I hereby represent that the insured is in good health, and free
from disease or ailment at the time of the reinstatement."
and further alleged that said representation was true and correct and
was made for the purpose of inducing the defendant to reinstate the
policy of insurance which had previously lapsed for non-payment of
premiums.

It is further alleged in the affidavit of defendant that on
the first day of January, 1935, and for a long time prior thereto, the
plaintiff was in ill health. From October 2, 1934, to the date
of insured's death, February 7, 1935, the insured was told and kept
being treated by a physician for myeloma-phosia, diabetes, and he
was confined to the Bryan Hospital, Lincoln, Iowa, for
heart disease, anemia, diabetes, and other ailments and had been treated for
five (5) years prior thereto for most of the period; that according
to the terms and provisions of the certificate of insurance, it is
provided as follows:

"This certificate, after full and complete payment of any premium
due, may be retained when the insured is suffering from the condition
covered by the policy of insurance, and during the period of retention,
the insured may not in any way be liable for the loss of the insurance,
it is a risk and hazard under which the insured is placed, and in such event,
the liability of the company may be limited to the amount of the premium
paid by the insured hereunder."

and that at the date of the reinstatement of said certificate of
insurance issued and was in good health at above and that the liability of
was not a risk to be assumed by the defendant and that the liability of
the defendant, if any there be, is the amount of consideration by it

and further denies its indebtedness to the plaintiff in the sum of \$500.00 or in any sum whatsoever other than the sum of \$15.00 which represents the premiums received by the company and which said sum it now tenders and brings into open court.

The affidavit of defense further alleges that, thereafter, by leave of Court, the plaintiff filed an amendment to the statement of claim which amendment alleged the following:

"After this certificate shall have been in continuous force for one year during the life of member it shall be incontestable if assessments have been duly paid, except the limitations as to prohibited occupations and crimes, as hereinafter set forth and made a part hereof, but if the age of the member has been misstated the amount payable under this certificate shall be such as the member would have been entitled to at the correct age."

To this amendment to the statement of claim, the defendant filed its answer, alleging as follows:

"1. Denies that the said certificate has been kept in continuous force for one year during the lifetime of the member and on the contrary alleges that the said certificate lapsed for nonpayment of premium due for the months of November and December, 1937, and that the said policy was reinstated on the 31st day of January, 1938."

Thereafter, a motion was made to strike the statement and amended statement of defense for the following reasons;

"It affirmatively appears that the incontestable clause in the said policy of insurance bars and precludes the defendant from maintaining and asserting the defenses set forth in the defendant's answer and amended answer."

Upon a hearing on said motion, the Court ordered the statement and amended statement of defense stricken from the files, and the defendant having elected to stand on same, judgment was entered against the defendant in the sum of \$500.00, which by stipulation of the parties was reduced to \$425.00, and costs.

The plaintiff contends that since the policy provides by its terms that "after this certificate shall have been in continuous force for one year during the life of the member, it shall be incontestable if assessments have been duly paid * * *" the defendant is therefore estopped from attacking the application for reinstatement on the ground of misrepresentations made in the application for reinstatement since

and further denies the indebtedness to the plaintiff in the sum of \$500.00 or in any sum whatsoever other than the sum of \$500.00 which represents the premiums received by the company and which will not be now tendered and bring into cash account.

The affidavit of defense further alleges that, therefore, by leave of Court, the plaintiff filed an amendment to the statement of claim which amendment alleged the following:

"After this certificate shall have been in continuous force for one year during the life of member it shall be incontestable if assessments have been duly paid, except the limitation as to prohibited occupations and avocations, as provided for therein and made a part hereto, and if the sum of the money has been distributed the amount payable under this certificate shall be paid to the member who would have been entitled to it at the notice given."

To this amendment to the statement of claim, the defendant filed its answer, alleging as follows:

"1. Denies that the said certificate has been kept in continuous force for one year during the lifetime of the member and on the contrary alleges that the said certificate issued for nonpayment of premium due for the months of November and December, 1937, and that the said policy was surrendered on the first day of January, 1938."

Thereafter, a motion was made to strike the statement and amended

statement of defense for the following reasons:

"It is alleged by answer that the incontestable clause in the said policy of insurance does not exclude any defendant from maintaining and asserting the defense set forth in the defendant's answer and amended answer."

Upon a hearing on said motion, the Court granted the amendment and amended statement of defense provided from the filing, and the defendant having elected to stand on said, judgment was entered against the defendant in the sum of \$500.00, which by attachment of the parties was reduced to \$433.75, and costs.

The plaintiff complains that since the policy issued by

its terms that after this certificate shall have been in continuous force for one year during the life of the member, it shall be incontestable if assessments have been duly paid " " The defendant is therefore estopped from attacking the limitation for reinstatement on the ground of misrepresentation made in the application for reinstatement since

the policy herein sued upon has been in force for a period of more than one year from its date of issue, and therefore, is incontestable.

Defendant, however, contends (1) that the defense herein does not contest the policy but attacks the contract upon which the policy was reinstated; (2) that the policy provides that it shall only become incontestable after it has been in continuous force for one year during the life of the member if assessments have been duly paid and that since the policy had not been in continuous force for more than one year, and that all assessments had not been duly paid the incontestable clause would not estop the defendant from asserting its defense for misrepresentations made in the application for reinstatement; (3) that the incontestable clause as contained in the policy does not extend to the contract of reinstatement and inasmuch as the contract of reinstatement does not contain a provision limiting a contest thereon to a period of two years, it is subject to contest for fraud and misrepresentation at any time, in the same manner as any other contract; (4) and further contends that since the policy herein provides,

"This certificate after default in payment of any assessment, may be reinstated upon the member furnishing to the association correct evidence of good health, and paying the required payment. Where the member was not in good health at the date of reinstatement, is a risk not assumed under this certificate, and in such event, the liability hereunder may be limited to the amount of assessments paid by the member thereafter,"

and that since the member was not in good health at the date of reinstatement, the risk was not assumed by the defendant.

Defendant further strenuously contends that the policy lapsed because of the failure of Dorval to pay the premiums due for the months of November and December, 1937, and that there is, therefore, no liability on the part of the defendant thereunder other than a refund of premiums by it received after the date of reinstatement.

From the facts, it appears that on December 13, 1933, the Guarantee Trust Mutual, a mutual benefit association, delivered a certificate of insurance to Joseph Alphonse Dorval, agreeing to pay to his beneficiary, Hazel Dorval the sum of \$1,000 upon his death. It appears from the pleadings that, thereafter on October 7, 1936, the

the policy herein sued upon has been in force for a period of more than one year from its date of issue, and therefore, is incontestable.

Defendant, however, contends (1) that the defendant herein

does not contest the policy but attacks the contract upon which the policy was reinstated; (2) that the policy provides that it shall only become incontestable after it has been in existence a term for one year during the life of the insured; and (3) that the policy provides that since the policy had not been in existence longer than one year, and that all requirements had not been fully met, the incontestable clause would not apply, and defendant from asserting its defense for

misrepresentation made in the application for reinstatement; (4) that the incontestable clause is contained in the policy and not in the contract of reinstatement and therefore, the contract of reinstatement does not contain a provision requiring a contract term of a period of two years, it is subject to contract law and misrepresentation at any time, in the same manner as any other contract; (5) and further contends that since the policy herein provided,

"This certificate shall remain in effect in payment of any amount which may be reinstated upon the policy provided for in the contract, and upon the receipt of evidence of good health, and upon the receipt of payment, there shall be no loss of benefit of the life of the insured, and in such event, as a risk not assumed under this certificate, and in such event, the liability hereunder may be limited to the amount of amount paid by the insurer hereunder."

and that since the insurer was not in good health at the date of reinstatement, the risk was not assumed by the defendant.

Defendant further strenuously contends that the policy herein because of the terms of article 10, of the provisions of the contract of November and December, 1927, and that there is, therefore, no liability on the part of the defendant insurance company that a period of provision it received after the date of reinstatement.

From the facts, it appears that on November 12, 1927, the defendant Trust Mutual, a mutual benefit corporation, delivered a certificate of insurance to Joseph Edward Goyel, agreeing to pay to his beneficiary, Joseph Goyel the sum of \$1,000 upon his death. It appears from the evidence that, Goyel died on October 7, 1928, the

certificate was assumed by the Guarantee Trust Life Insurance Company, the present defendant, by virtue of a reinsurance contract which limited the amount that would be payable under the old certificate to \$350.00. As already stated, during the months of November and December, 1937, the insured failed to pay his premiums and his policy was therefore lapsed.

This cause, as we have indicated, came on to be heard upon the motion of the plaintiff to strike the statement of defense, in which the facts set forth in this motion were considered by the court and plaintiff's motion to strike was sustained. The defendant having elected to stand on its pleading, judgment was entered, upon which judgment this appeal is now pending. The defendant does not contend that it is contesting the original certificate of insurance as issued, but is contesting the reinstatement contract because of fraudulent misrepresentations made by the insured in the reinstatement application. It urges that where the company waives its right to end the insurance, the policy never has terminated at all; thus, a premium due today, the policy holder neglects to pay it, tomorrow he tenders the money. The company can, defendant urges, if it likes, simply accept the premium and take no advantage of the default, and cites the case of Monahan v. Fidelity Mutual Insurance Company, 242 Ill. 488, where the court in its opinion said, " * * * there was no forfeiture (termination) and there was no new contract made between the parties, but the old policy remained in force * * *". Defendant calls what took place "waiver"; and says that waiver thus is our usual appellation for the conduct charged against the company's negative exercise of its election.

Plaintiff's reply is that the original certificate of insurance was issued on December 13, 1933, and contained a provision to the effect that "after this certificate of insurance shall have been in continuous force for one year during the life of the member, it shall be incontestable if assessments have been duly paid." The insured died on February 7, 1939, more than six years after the issuance and delivery of the certificate of insurance, and plaintiff thereby contends

that the certificate was wholly incontestable for any cause except for non-payment of assessments.

The plaintiff urges that in Murphy v. Old Colony Life Insurance Company, 219 Ill. App. 649, (Certiorari denied 219 Ill. App. xiii), the precise question presented in the present record was before the court, and that the defendant in that case, as in the case at bar, elected to stand by an affidavit of merits and appealed from a judgment entered as in case of default. The opinion in this case is called to our attention and is an unpublished opinion. In this opinion the Court said;

"This is an action brought on an insurance policy issued by defendant company. It electing to stand by its affidavit of merits and appealing from the judgment entered as in case of default, the question presented is as to the sufficiency of the defense, which is, in substance, that the policy having lapsed for failure of insured to pay a premium and having been reinstated on his application containing false and untrue representations, knowingly made by him, that he was in good health and free from physical ailment, the reinstatement was null and void. The policy contained clauses conforming to the statute making it incontestable two years after its date, and in the event of default in premium payments, giving the right to reinstatement upon evidence of the insurability at the time of reinstatement 'satisfactory to the company', etc. (pars. 3 and 9, Sec. 6513, Jones & Addington Stats.)

"The policy was issued in 1909, the default and reinstatement on compliance with conditions required, were in July 1915, death of the insured occurred in December, 1916, and the suit was brought in June, 1917.

"It is appellant's contention that it may avoid the effect of reinstatement made upon such false representations within the period of two years thereafter. In other words, that the period of contestability runs anew from the date of reinstatement, especially where the reinstatement was induced by fraud.

"In support of its position cases are cited from other jurisdictions, like Teeter v. United Life Ass'n., 159 N. Y. 411, and those following it holding that the period of limitation for contest commences anew upon the reinstatement of the policy, on the theory that the reinstatement is a new contract of insurance, and cases like State Mutual Life Ins. Co. v. Rosenberry (Tex.), 213 S.W. 243, holding that while the contract for reinstatement is to be regarded not as a new contract but as a waiver of forfeiture, it reserves the right to avoid the reinstatement if induced by fraudulent means.

"The rule followed in Monahan v. Fidelity Life Ins. Co. 243 Ill. 488, is that a reinstatement is merely a cancellation of the forfeiture, and that the original policy continues in full force without interruption. In that case while the death of the insured was less than two years after the reinstatement of the policy it was more than two years after its issuance, and the policy was accordingly held incontestable. Reviewing conflicting authorities on the subject the court declined to follow the rule announced in the Teeter and other cases relied on by appellant, and adopted the rule of other

that the certificate was properly executed and the copy was correctly
for non-payment of taxes.

The plaintiff's case was decided in favor of the defendant.

On appeal, the court affirmed the decision of the trial court, and held that the defendant was entitled to the judgment. The court stated that the plaintiff's case was decided in favor of the defendant, and that the defendant was entitled to the judgment. The court also stated that the plaintiff's case was decided in favor of the defendant, and that the defendant was entitled to the judgment.

This is an action brought by the plaintiff against the defendant for the recovery of a sum of money. The plaintiff claims that the defendant owes him a sum of money, and that he is entitled to recover the same. The defendant denies the plaintiff's claim, and states that he does not owe the plaintiff any money. The court has heard the evidence of both parties, and has rendered its decision in favor of the plaintiff. The court has found that the plaintiff's claim is valid, and that the defendant is liable to pay the sum of money claimed by the plaintiff.

The policy was issued in 1900, and the plaintiff was insured under it. The policy was for a term of years, and the plaintiff was entitled to the proceeds of the policy upon his death. The plaintiff died in 1905, and the defendant refused to pay the proceeds of the policy to the plaintiff's estate. The plaintiff's estate brought this action against the defendant to recover the proceeds of the policy.

It is the plaintiff's contention that the defendant is liable to pay the proceeds of the policy to the plaintiff's estate. The plaintiff's estate claims that the defendant is liable to pay the proceeds of the policy to the plaintiff's estate, and that the defendant is liable to pay the proceeds of the policy to the plaintiff's estate. The defendant denies the plaintiff's claim, and states that he does not owe the plaintiff any money.

It is the plaintiff's contention that the defendant is liable to pay the proceeds of the policy to the plaintiff's estate. The plaintiff's estate claims that the defendant is liable to pay the proceeds of the policy to the plaintiff's estate, and that the defendant is liable to pay the proceeds of the policy to the plaintiff's estate. The defendant denies the plaintiff's claim, and states that he does not owe the plaintiff any money.

The court has heard the evidence of both parties, and has rendered its decision in favor of the plaintiff. The court has found that the plaintiff's claim is valid, and that the defendant is liable to pay the sum of money claimed by the plaintiff. The court also stated that the plaintiff's case was decided in favor of the defendant, and that the defendant was entitled to the judgment.

cases referred to therein to the effect that the contract to which the limitation is applicable is that of the original application and policy, and not the reinstated one. This is in consonance with the statute which makes the policy and application therefor the entire contract between the parties. While fraud was not the defense in the Monahan case, what was said of the contract and contestability is applicable to the facts here and justified the court below in striking the affidavit on the ground that misrepresentation in the application for reinstatement is not part of the contract between the parties which by the terms of the statute as well as the policy is made 'incontestable after two years from its date', except for specified grounds not involved here and that do not include fraud. We need not, however, discuss authorities of other jurisdictions.

"Furthermore, as the statute puts no restrictions upon the company's determination of what it shall deem statutory evidence of insurability at the time of reinstatement, the company would hardly seem to be in a position to question the waiver of forfeiture so long as it chose to accept as satisfactory the mere statement of the insured with regard to his health without taking other precautions such as are usually observed with regard to insurability before issuing a policy. However it is unnecessary to decide this question if the insurer is precluded from making any defense after the lapse of two years from issuance of the policy other than those defenses named in the statute, viz., non-payment of premiums and violation of the conditions of the policy relating to military or naval service in time of war."

Again, this court approved the opinion in the _____ case of Fendi v. Metropolitan Life Insurance Company, 294 Ill. App. 606, an opinion also not reported in full, where the court reaffirmed the principles announced in the Murphy case and reviewed and commented upon many of the cases cited and relied upon by the defendant in the instant case. In that case the court said;

"In passing upon the next question as to whether the insured was properly reinstated after the alleged default in the payment of premiums by the insured, the clause of the policy to which we have referred in this opinion provides that the policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for non-payment of premiums. Although the premiums were not paid, the Insurance Company accepted the premium at the time the policy was reinstated. There were no restrictions upon the company's determination of what it should deem evidence of insurability at the time of reinstatement. Having accepted as satisfactory the statement of the insured, the company waived the right of forfeiture. The defendant has cited a number of authorities from other jurisdictions upon the question of its right where the policy is in default and contains an incontestable clause, which authorities are to the effect that the company is not deprived of the right to contest after default on the ground of fraud in the application for reinstatement after two years from the date of the issuance of the policy. We believe the case of Murphy v. Old Colony Life Insurance Company, 319 Ill. App. 649, an unpublished opinion, is apt in passing upon the very question involved in this proceeding."

After quoting in its entirety the opinion in the Murphy case, the court continued;

"A certiorari to review the foregoing opinion was denied by the Supreme Court of Illinois.

"The same reasoning as appears in the opinion we have just quoted is applicable to the pending litigation, which is in effect that the defendant company on the one hand is not in a position to question the waiver of forfeiture when it accepts as satisfactory the statement of the insured and the answers required in regard to his health where the company fails to adopt other precautions such as are usually adopted with regard to insurability before issuing a policy.

"It is to be noted from this opinion that this court did not follow the conflicting authorities cited by the parties to the litigation, but adopted the rule that the contract to which the limitation is applicable is that of the original application and policy, and not the reinstated one. In other words, the reinstatement is a cancellation of the forfeiture and the original policy continues in full force and effect without interruption.

"The reply of the defendant insurance company, as to the effect of this authority, is that the Supreme Court held in Keller v. North American Life Insurance Company, 301 Ill. 198, that the rule announced in the Monahan case was not applicable. The question in the Keller case is was the premium paid when the insured issued a promissory note and made a small cash payment to the insurance company. The acceptance of said note was conditional payment, and this appears from the language used by the court in that case. The defendant company admits that a reinstatement restores the policy, yet urges that the reinstatement does not restore the parties to the same status they occupied prior to the default; that the parties occupy a changed status created by the new application and their status must be measured by the rights and obligations of the new contract as well as by the old.

"In this case the company accepted the premium and the policy was reinstated and, under its terms, was in full force and effect. A new contract between the parties was not entered into due to the fact of the reinstatement. By the acceptance of the application for reinstatement and the premium, the company waived the right of forfeiture, and therefore the contract between the parties occupied the same status as it occupied prior to the default.

"We have already pointed to the fact that the Supreme Court of this State declined to review the opinion filed in the case of Murphy v. Old Colony Life Insurance Co., 319 Ill. App. 649. The Supreme Court, in effect, approved what was said in the opinion filed by this court."

In the case of Froehler v. North American Life Ins. Co. of Chicago, decided April 10, 1940, and rehearing denied June 12, 1940, 374 Ill. 17, the Illinois Supreme Court in its most recent consideration of the effect of a reinstatement, reaffirms its previous holding in Monahan v. Fidelity Life Ins. Co., 243 Ill. 488, which case the defendant seeks to distinguish in his brief, and says;

"In the case which we are now considering the insured had a contractual right to be reinstated and this provision of the policy was as valid and binding as any other provision therein. Under such a policy as this one the lapse for non-payment of premiums does not make necessary the formation of a new contract, but the reinstatement when effected merely cancels the forfeiture, leaving the original contract in full force. (Monahan v. Fidelity Life Insurance Co., 242 Ill. 488; 4 Cooley on Insurance, (2d ed.) p. 3800). * * * In his original policy of insurance, the insured bought and paid for a right to be reinstated after default in the payment of premium upon furnishing evidence of insurability satisfactory to the company and the payment of all past due premiums with interest. The record shows * * * that he furnished the company all the evidence that it required as to his insurability. It is unnecessary for us to decide * * * whether the company might have required further evidence."

This would apply to the instant case as the insured furnished to the company all the evidence it required, and not having asked or required further evidence of insurability, it is in no position to complain that the evidence upon which it acted is now unsatisfactory for any reason or cause. We agree with the plaintiff that upon the reinstatement of the policy of insurance the insured was in precisely the same position as though the same had never lapsed; and that, consequently, since the policy expressly provides it cannot be contested after the lapse of one year from the date of its issue to permit the defendant to do that which the policy says shall not be done is to make a new contract between the parties. We also quite agree with the words of the Supreme Court of the United States, in Mutual Life Insurance Company v. Hurni Packing Co., 263 U. S. 167, which are that;

"In order to give the clause the meaning which the petition ascribes to it, it would be necessary to supply words which it does not at present contain. The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue."

From the pleadings it appears that the certificate of insurance provides that "after default in payment of any assessment this certificate may be reinstated upon the member furnishing to the association correct evidence of good health". What this "correct evidence of good health" shall be, is, of course, left entirely with the Association. After a careful consideration of the pleadings we are of the opinion that the court was justified in sustaining the motion of the plaintiff and entering judgment against the defendant in the amount of \$425.00.

JUDGMENT AFFIRMED.

BURKE AND DENIS E. SULLIVAN, JJ. CONCUR.

41293

SOFT-LITE LENS COMPANY, INC., a Corporation,

APPEAL FROM

Appellee,

CIRCUIT COURT

v.

COOK COUNTY.

BENJAMIN D. RICHOLS, et al.,

Appellants.

308 I.A. 323²

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff in this cause filed a petition in the Circuit Court praying for an order directing the clerk of the Court to issue an execution for costs for \$410.25, in favor of plaintiff and against defendants, which the clerk had not taxed as costs and for which he refused to issue execution. This matter was heard and considered by the Chancellor upon said petition, defendants' answer and plaintiff's supplemental petition. The Chancellor entered an order directing the clerk to issue the execution, and the appeal is by the defendants from that order.

In its petition plaintiff alleged that by the decree theretofore entered, the circuit court had, among other things, found that it appeared from the report of the Master to whom the case was referred that the services of a court reporter were necessary for the taking and transcribing of the testimony at the hearing before him; that of the sum properly chargeable as costs on account of said stenographic services the plaintiff had paid \$410.25; that the decree had allowed the same as costs in favor of plaintiff and against defendants; and that the Court had decreed that plaintiff recover its costs, including said sum of \$410.25, and have execution therefor against defendants. It was further alleged in this petition that an appeal from said decree was taken by defendants to this Court; that an opinion was rendered herein on June 21, 1939; a rehearing denied on July 3, 1939; a petition by defendants for leave to appeal to the Supreme Court was thereafter denied; that thereupon a mandate was issued by this Court and filed with the clerk of the circuit court, which affirmed the decree in all respects except as to

RECEIVED
JULY 1 1933
U.S. DISTRICT COURT
SOUTHERD DISTRICT OF NEW YORK

3081A.323

MR. THOMAS H. HARRIS, CLERK OF THE COURT.

The plaintiff in this cause filed a petition in the Circuit Court praying for an order directing the clerk of the court to issue an execution for costs for \$10.00, in favor of plaintiff and against defendants, which the clerk had not done on costs and for which he refused to issue execution. This matter was heard and submitted by the Chancellor upon said petition, defendant's answer and plaintiff's supplemental petition. The Chancellor entered an order directing the clerk to issue the execution, and the removal is by the defendants from that order.

In its petition plaintiff alleged that by the decree there- before entered, the circuit court had, among other things, found that it appeared from the report of the master in whom the cause was referred that the services of a court reporter were necessary for the taking and transcribing of the testimony at the hearing before him; that all the sum properly chargeable as costs on account of said stenographic services the plaintiff had paid \$10.00; that the decree had allowed the same as costs in favor of plaintiff and against defendants; and that the court had decided that plaintiff recover its costs, including said sum of \$10.00, and have execution therefor against defendants. It was further alleged in this petition that an appeal from said decree was taken by defendants to this court; that an opinion was rendered herein on June 11, 1933; a rehearing denied on July 3, 1933; a petition by defendants for leave to appeal to the Supreme Court was denied; that there- upon a mandate was issued by this court and filed with the clerk of the circuit court, which affirmed the decree in all respects except as to

the allowance of fees and stenographic allowance to the Master, and, with respect thereto, reversed and remanded the case; that plaintiff then requested a cost bill from the clerk of the Court and found, upon receiving it, that said sum of \$410.25 was not included, and that the clerk had refused to issue the execution.

The petition prayed for an order directing the clerk to issue an execution against defendants for the sum of \$410.25.

The defendants' Answer set out the mandate issued by this Court, which in substance provides that the decree of the circuit court was affirmed in all respects except as to the allowance of Master's fees and charges for services and stenographic expenses, and as to those allowances reversed the case with directions to the Circuit Court to hear whatever testimony might be presented by the Master as to the nature, extent and reasonable compensation to be paid him for the work done in preparing his report, folio allowance and stenographic expense. It was further answered by the defendants that in the opinion rendered by this Court on said former appeal this Court specifically disallowed said sum of \$410.25 for stenographic fees awarded to plaintiff, holding that same were not justified by anything in the record; and it is further averred that, in addition to the fact that the reversal by this court was on the ground that there was no justification as matter of law for such an allowance to the plaintiff, instead of to the Master, for such a stenographic charge, proof of the reasonableness of the charge had not been made, and that such proof was required upon a rehearing pursuant to the mandate issued.

The mandate of this Court on the former appeal (in the case of Soft-Lite Lens Co., Inc., v. Ritholz, et al., 301 Ill. App. 100) stated that:

" * * that part of the decree of the Circuit Court of Cook County in this behalf rendered in so far as to the allowance to the Master be reversed, annulled, set aside and wholly for nothing esteemed. In all other respects said decree is affirmed and is to stand in full force and effect notwithstanding the said matters and things therein

The allowance of fees and expenses allowed to the witness, and
with respect to the witness, and the witness, and the witness,
then requested a copy of the bill from the clerk of the court, upon
receiving it, that said bill of \$10.00 was not allowed, and that the
clerk had refused to issue the allowance.

The petition is for an order directing the clerk to
issue an execution against the defendant for the sum of \$10.00.
The defendant's answer set out the reasons for his refusal to
issue, which is embodied in the bill of the clerk, copy
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fees and charges for services and expenses, and as to those
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assigned for error, and that said cause be remanded to the Circuit Court of Cook County with directions to said Circuit Court to hear whatever testimony may be presented by the master in chancery, after reasonable notice to him, as to the nature extent and reasonable compensation to be paid to him for the work done in preparing his report, folio allowance and stenographer expense."

and it is suggested that it is clearly seen that the allowance to the plaintiff of the \$410.25 was not reversed and remanded and that the mandate did not contain directions to the Chancellor to hear testimony in connection therewith, but that on the contrary, the mandate expressly affirms that part of the decree allowing to plaintiff the said sum.

It would be well to have in mind that the defendants presented their petition to the Supreme Court of Illinois for leave to appeal from the final order and judgment of this Court, and that the petition for leave to appeal was denied and the mandate of the Supreme Court thereafter delivered to the Clerk of this Court and thereafter the said Clerk of this court issued the mandate of this court, which affirmed the decree in all respects except as to the amount of the Master's fees and remanded the said cause to the Circuit Court of Cook County, Illinois, for the taking of additional testimony as to the nature and value of the services rendered by the Master in Chancery before whom the cause was originally heard.

In a discussion of the questions that are involved in this appeal, it is well to have before us that part of the decree that passes upon the question of costs properly due to plaintiff, and the Master's report which found that the services of a Court Reporter were necessary in the taking and transcribing of the testimony, which decree ordered that the amount of \$410.25 be fixed and allowed as costs chargeable against the defendants. The mandate of this Court on the questions involved stated that;

" * * * that part of the decree of the Circuit Court of Cook County in this behalf rendered in so far as to the allowance to the Master be reversed, annulled, set aside and wholly for nothing esteemed. In all other respects said decree is affirmed and is to stand in full force and effect notwithstanding the said matters and things therein assigned for error, " * * *."

The rule that governs in a case of the character that we have before us is stated in the case of Muhlke v. Muhlke, 285 Ill. 325, where the mandate contains only a general remanding order, and the court stated;

"The mandate issued January 17, 1918, contains only a general remanding order, concluding with this sentence: 'Therefore it is considered by the court that for that error and other in the record and proceedings aforesaid the decree of the superior court of Cook County in this behalf rendered be reversed, annulled, set aside and wholly for nothing esteemed, and this cause be remanded to the superior court of Cook County, with direction to enter a decree in conformity with the views expressed in the opinion filed herein.'"

so that, from what the court stated, the lower court was specifically directed to enter a decree in conformity with the opinion of the Appellate court. Of course, the lower court must then have considered the opinion of the Appellate court for the purpose of obeying the instructions. It is, however, stated in the same opinion that;

"Where the direction contained in the mandate of this court is precise and unambiguous it is the duty of the trial court to carry it into execution and not to look elsewhere for authority to change its meaning or direction. The mandate of the court of review, and not its opinion, governs when the mandate differs from the opinion or is specific and plain in its terms."

Therefore, when we come to consider the question involved, we find that this court in its directions to the Circuit Court instructed it "to hear whatever testimony may be presented by the master in chancery, after reasonable notice to him, as to the nature, extent and reasonable compensation to be paid him for the work done in preparing his report, folio allowance and stenographer expense." It is plain to be seen that this direction in the mandate of this court is precise and clear that the Chancellor is to hear testimony as to the amount of the Master's fees, and the cause was remanded to the Circuit Court for the purpose of taking such additional testimony. This mandate is clear in its terms and is specific in that the court is to consider the evidence that is to be presented by the Master after reasonable notice to him, as to the nature, extent and reasonable compensation to be paid him for the work done in preparing his report, folio allowance and stenographer expense.

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instructions. It is, however, stated in the same document that the opinion of the Appellate Court for the State of Illinois is directed to enter a decree is accordingly with the opinion of the Appellate Court. Of course, the lower court was then reversed as it is from what the court stated, the lower court was accordingly

"Here the direction provisions in the contract are not
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to carry it into execution and not to look elsewhere for authority
to change its ruling or direction. The words of the court are
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therefore, then he comes to consider the suspension involved, as this work

The rule as has been stated is further approved in the case of Fisher v. Burks, 285 Ill. 290, which case was cited by defendants in their brief, where the court said:

"The mandate is the judgment of this court transmitted to the Circuit Court. Where the direction contained in it is precise and unambiguous, it is the duty of the trial court to carry it into execution and not to look elsewhere for authority to change its meaning or direction. * * * It is the mandate of the court of review, and not its opinion, that governs, when the mandate differs from the opinion or is specific and plain in its terms. * * * If the mandate was not in accordance with the judgment of this court it was up to the plaintiff in error to show by the judgment of this court that it was erroneous and to have a proper mandate issued, as the lower court could not take judicial notice of the judgment of this court."

Also, in the case of Chicago Title & Trust Company v. Irwin, 270 Ill. App. 540, the rule is stated as follows:

"We understand it to be the well established rule that, where a decree is reversed by a reviewing court and the cause is remanded to the inferior tribunal with certain specific directions, nothing can be done by such inferior tribunal except to carry out such directions, without regard to whether or not those directions may be erroneous, inadequate or inappropriate, and that the judgment and mandate of the reviewing court and not its opinion, should govern and be the inferior tribunal's guide."

In the instant case the mandate was clear and specific. It reversed the decree of the Circuit Court insofar as the allowance to the Master was concerned, and affirmed the decree in all other respects. Even if the opinion of the Appellate Court had revealed any doubt in the mind of the trial court as to the validity of the allowance to the plaintiff, the mandate affirmed the decree in this respect and the Circuit Court had no choice but to follow the mandate.

The plaintiff suggests in its brief that the defendants filed a petition for rehearing, but that at that time neglected to point out the contention that they now make to the effect that the decree should not have awarded plaintiff the sum of \$410.25; and that after the mandate had been delivered to the Circuit Court and after plaintiff had filed its petition in the Circuit Court for the entry of the order from which this appeal is taken, the defendants filed a motion in this Court asking it to recall its mandate and to issue a new mandate reversing the allowance to the plaintiff, to which motion plaintiff filed counter-suggestions and the Appellate Court saw fit to deny defendant's motion.

and a further report of a boy's case and an interview

Case of *Wright v. Carter*, 222 Ill. 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1

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Also, in the case of Chicago Little & Trust Company, No. 11,

10-10-68

[illegible]

the Court had no choice but to follow the majority.

THE INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

point out the contention that they now have to the effect that the

There should not have been a direct reference to the fact that the

As soon as had been advised to the effect that the above mentioned

There are no other persons named in the report.

For which this appeal is made, the defendant is not a citizen of this

outgoing to the ...

He is known to the district, to which he is assigned, to which he is assigned.

...and the ...

We quite agree with this statement and that the Chancellor was justified in entering the order directing the clerk to issue execution for costs of \$410.25, and that the Court did not err in directing the clerk of the Court to issue execution as suggested in the court's order.

The plaintiff contends that the order appealed from is not an appealable one, and then calls our attention to the fact that the decree of the Circuit Court, entered October 30, 1938, by its terms awarded plaintiff the sum of \$410.25, and provided that plaintiff have execution therefor; and then further states that because said decree was affirmed in part and reversed in part, the Clerk of the Circuit Court refused to assume the responsibility of preparing an execution in accordance with said decree without having been first directed so to do by the Chancellor; and contends that the authorities are agreed that an order for the mere purpose of giving effect to a final and appealable decree is not itself appealable and presents no issue for a court of review - - citing cases.

However, in considering this question, the order that was entered was to make that part of the decree for costs due the plaintiff, enforceable by the court's order directing that the clerk of the court issue an execution for costs for \$410.25, in favor of plaintiff and against the defendants. Having determined by what has been said in this opinion that the court did not err in entering the order, the question as to whether the order is an appealable one, of course, is to be considered. In the case of Nasch v. Nasch, 378 Ill. 261, the court held that the party against whom master's fees have been taxed as costs should not be deprived of his right of appeal by summary contempt action to enforce the decree, and the court in its opinion said;

" * * * Under the statute the master's fees are in the nature of costs and should be allowed and taxed as such, and any party who deems himself aggrieved either in respect to the amount allowed or as to the party against whom they are taxed has his right of appeal from that portion of the decree which fixes and taxes such costs, and appellant should not have been deprived of this right by the summary proceedings by contempt. * * *"

[illegible]

In the instant case the order was entered taxing the sum of \$410.85, as costs, in favor of the plaintiff and against the defendants, and that execution issue, and was properly the subject of appeal.

There are other questions that have been called to our attention; however, having considered and passed upon the merits of this appeal, it will not be further necessary to pass upon the questions raised by the parties. The order of the court is affirmed.

ORDER AFFIRMED.

BURKE AND DENIS E. SULLIVAN, JJ. CONCUR.

In the instant case the order was entered under the
 one of M.D. 20, as costs, in favor of the plaintiff and against the
 defendants, and that execution issue, and was properly the subject of
 appeal.

There are other questions that have been raised in this
 attention; however, having considered and passed upon the merits of
 this appeal, it will not be further necessary to pass upon the
 questions raised by the parties. The order of the court is affirmed.

THOMAS STEPHENS.

WHEAT AND KELLY E. SULLIVAN, J.S. OFFICERS.

41300

SOFT-LITE LENS COMPANY, INC., a corporation,

Plaintiff,

BENJAMIN D. RITHOLZ, et al.,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Appeal from decree in favor of MASTER ISIDORE
BROWN,

Appellee.

308 I.A. 324¹

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The defendants seek to reverse the order of the Chancellor that was entered upon plaintiff's petition praying for a hearing upon the question of the reasonable value of the Master's fees, which order fixed the Master's fees in the sum of \$957.75 and directed that execution issue. This court filed an opinion in an appeal by the defendants from the original decree in favor of plaintiff, which decree was entered on October 20, 1938, and allowed to the Master as costs, to be taxed against defendants, the sum of \$2,990.30 for his fees and charges. In that opinion this court found that the Master's charges were not established by evidence that justified the allowance, and while affirming the decree in other respects, remanded the case for a hearing of evidence as to the nature, extent and reasonable compensation to be paid the Master. (Soft-Lite Lens Co. Inc. v. Ritholz, et al., 301 Ill. App. 100, 117). A petition was filed by defendants in the Supreme Court for leave to appeal, which petition was denied, and the mandate of the Appellate Court filed with the clerk of the Circuit Court of Cook County, Illinois.

The plaintiff's petition prayed, among other things, that an order be entered setting said cause for hearing on the question of the reasonable value of the Master's fees, to which the defendants filed their answer; upon a hearing that was had, it appears from the facts that the original decree in favor of plaintiff, entered on October 20, 1938, allowed to the Master as costs the sum of \$2,990.30

JOHN L. LANE, JR., a corporation

Chicago, Illinois

JOHN L. LANE, JR., a corporation

Chicago, Illinois

Appeal from decree in favor of defendant

Chicago, Illinois

8081A 824

MR. JAMES L. LANE, JR., a corporation

The defendant seeks to recover the value of the property

that was entered upon plaintiff's petition for a decree

the question of the reasonable value of the property

fixed the master's fees in the sum of \$200.00

execution issued. This court filed an order in its order of the

defendants from the original decree in favor of plaintiff, which decree

was entered on October 30, 1935, and allowed to the master in costs

to be taxed against defendant, the sum of \$1,000.00 for his fees

and charges. In that opinion this court found that the master's

were not established by evidence that justified the allowance, and

while affirming the decree in other respects, remanded for costs for a

hearing of evidence as to the master's expenses and reasonable

to be paid the master. John L. Lane, Jr., a corporation, et al., vs.

Ill. App. 100, 117. A petition was filed by defendant in the circuit

Court for leave to appeal, which petition was denied, and the master

of the Appellate Court filed with the clerk of the Appellate Court

Cook County, Illinois.

The Appellate Court's petition was filed about March, 1936

an order to be entered setting aside the master's fees and the question of

the reasonable value of the master's fees, it being the defendant's

filed their answer; upon a hearing held for that purpose the court

facts that the original decree in favor of plaintiff, entered on

October 30, 1935, allowed to the master in costs the sum of \$1,000.00

for his fees and charges. As we have already indicated, on appeal this court found that the Master's fees were not justified and remanded the cause. The court, in the instant case, after considering the questions which were involved with reference to the taxing of Master's fees, entered an order fixing the Masters fees in the sum of \$957.75, and directed that execution issue against the defendants and in favor of Isidore Brown, Master.

Upon the hearing the Master testified that he had asked for and been allowed by the Court the sum of \$2,990.30, and that in his opinion, he contends, he was entitled to about \$3000.00; that eliminating \$300 which he admitted had been an overcharge for the number of folios in the documentary evidence, his fees amounted to \$2,690.30, consisting of \$2,000.00 for the original reference, \$593.10 for folio charges and \$97.20 for his folio charges and fees on the re-reference. In support of his claim for fees, the Master introduced in evidence as his Exhibit 1, four cards which he testified were kept under his supervision and direction and were true and correct; that the total number of hours spent by him in the case were shown on said record cards; that said record cards were written by his sister from memoranda he gave her, and that he did not check the cards after they were written by her. There was introduced in evidence the Master's diary, from which he testified that he had numerous hearings and engagements and did a great amount of work on the various days when he charged a full day for his services in the instant case. He testified that he did not cite any cases in his Report, and did not file or turn over any cases to the Chancellor; that according to these cards the Master spent 63 hours beginning February 9, 1938 and ending on May 2, 1938 in taking evidence at the hearings before him, or according to his computation of 5 hours as constituting a day, approximately 13 days for which he claims \$40.00 per day, or a total of \$520.00 in addition to his statutory charge of 15¢ per folio for the total testimony taken and exhibits received. From the same record cards the Master claims 40 hours, or 8 days' time at

for his fees and charges, as we have already indicated, he would not
court found that the Master's fees were not justified and reasonable
the cause. The court, in the instant case, after considering the
questions which were involved and testimony in the hearing of Master's
fees, entered an order fixing the Master's fees in the sum of \$100.00,
and directed that execution issue against the defendant and in favor
of Jethro Brown, Master.

Upon the hearing the Master testified that he had been
for and been allowed by the court for the sum of \$100.00, and that he
opinion, he contends, he was entitled to receive \$100.00; that
affirming \$200 which he advised was paid to him for his services
of fees in the temporary retainer, and that he was paid \$100.00,
consisting of \$1,000.00 for the original retainer, \$100.00 for fees
charges and \$75.00 for his title charges and fees in the re-examination.
In support of his claim for fees, the Master introduced in evidence
his Exhibit 1, four copies which he testified were true copies of his
retainer and disbursement and were true and correct; that the first master
of hours spent by him in the case was shown on his retainer; that
said record cards were written by his sister from information in her
and that he did not check the cards after they were written by her.
There was introduced in evidence the Master's report, which he
testified that he had numerous handwritten corrections and had a great
amount of work on the various days when he received a bill by for his
services in the instant case. He testified that he did not give any
cases in his report, and did not give any other bill or report to the
Chancellor; that according to him he had never received any bill
beginning February 2, 1935 and ending May 1, 1935 in which he
the hearings before him, he testified he was not paid for 2 hours
a constituting a day, approximately 12 days for which he claimed \$100.00
per day, or a total of \$1200.00 in addition to his attorney's fees of
the fee for the total retainer which was not actually received. The
the same record made the Master's claim of \$100.00, or \$100.00, and

\$40.00 per day or \$320.00 for services in re-reading and studying the testimony and reading and examining exhibits introduced into the evidence and assimilation of evidentiary facts.

According to said cards and his testimony the Master claims that he devoted 23 days of 5 hours each to re-reading, examining, and studying memoranda submitted by defendants consisting of 11 type-written pages, making an examination and investigation of authorities cited by the parties, making an independent investigation of the authorities, preparing, dictating, drafting and correcting his report, for which he claims the sum of \$920.00.

The total claim by the Master in his original certificate for his services other than his statutory folio charges was the sum of \$2,000.00. According to the above mentioned record cards and his testimony upon the present hearing, his claim was for a total of 44 days at \$40.00 per day or a total of \$1,760.00. Upon the hearing below his counsel reduced the claim to one for 36 days at \$40.00 per day, or a total of \$1,440.00 for the said services other than the statutory folio charge. He offered further evidence of a Master in Chancery on the question of the proper fee to be allowed for the services rendered by him for the several days that he contends he is entitled to.

From the reading of the briefs, the Master contends that under the statute entitled "Fees and Salaries", Chap. 53, Par. 38, sec. 20, Ill. Rev. Stat. 1939, which provides;

" * * * In all counties hereafter masters in chancery may receive for examining questions in issue referred to them, and reporting conclusions thereon, and also in cases where the defendants are in default but under the order of reference the master is required to find and report conclusions, such compensation as the court may deem just; and for services not enumerated above in this section and which has been and may be imposed by statute or special order, they may receive such compensation as the court may allow. The Court may also include as a part of such master's fees a reasonable allowance not to exceed fifteen cents per hundred words for stenographer's services in cases where the master shall certify that a stenographer was necessarily employed,

140.00 per day or 140.00 for services in connection with the
the testimony and reading and examining exhibits introduced into the
evidence and examination of exhibits.

According to said statute and all testimony the master

claims that he devoted 25 days of 24 hours each in connection with the
and studying documents submitted by defendant's counsel as in type-

written papers, making an examination and investigation of exhibits

offered by the parties, making an independent investigation of the

authorities, preparing, dictating, writing and correcting his reports,

for which he claims the sum of 140.00.

The total claim by the master is his original certificate

for his services after that his previously filed statement for the sum

of 27,000.00. According to the above mentioned reports made by him

testimony upon the present hearing, his claim was for a total of 25

days at 140.00 per day or a total of 3,500.00. Upon the hearing

before his counsel reduced the claim to 25 days at 140.00 per

day, or a total of 3,500.00 for the said services when filed the

statutory folio charges. He offered further evidence of a master in

discharge on the question of the master's claim for 25

services rendered by him for the several days that he contends he is

entitled to.

From the reading of the statute, the master contends that

under the statute entitled "Law of Evidence," which reads, Sec. 25,

Sec. 20, Ill. Rev. Stat. 1905, which provides:

"* * * In all criminal cases the master is authorized
may receive for services rendered in connection with the
and reporting proceedings thereon, and also in cases where the
defendants are in custody and under the order of confinement the
master is required to file and report thereon, when necessary
after as the court may direct; and the master's report and statement
above in this section the court may order that it be received as
evidence or official report, that any master shall be considered as
master's report shall be received as evidence or official report
per hundred miles for transportation and necessary expenses,
master shall certify that a statement of the necessary expenses

and shall attach to his report a certified copy of the testimony taken by such stenographer. Upon reference of any matter to the Master in chancery the court may, in its discretion, at the time of such reference or at any subsequent time, order any party seeking to offer evidence before the master to deposit with the clerk of the court such sum or sums as may be fixed by the court to secure the payment of any part or all of the costs of such reference; and the court may, in its discretion, before the master shall be required to make a report in any cause, order the payment of all costs incurred before the master, the same to be taxed equitably in such manner as directed by the court."

that his claim is supported by the statutory provisions as well as by the evidence which was introduced on the hearing of the following claims contended for by him, which are;

Fees on re-reference over which there is no conflict	\$97.30
Folios for oral testimony, 3,342 at 15¢ per folio	501.30
Folios of documentary evidence, 261 at 15¢ per folio	39.15
Per diem as follows;	
Time spent in disposing of questions of law and fact during hearings, days	3
Studying evidence, days	8
Studying law and preparing Report, days . .	23
Ruling on Objections, days	1
Miscellaneous services, serving notices telephone calls, etc., days	<u>1</u>
Total days	36
At \$50.00 per day .	<u>1800.00</u>
	\$2,437.65
If only \$40.00 per day is to be allowed, then deduct	<u>360.00</u>
	\$2,077.65

The Master then replies to the contentions of the defendants and says that the above computation removes all claim for allowance that could conceivably be objected to and is all to little for the work performed by the Master in this case.

The defendants in answer to the claims of the Master contend that the Master is not entitled to any fees in this case by reason of his unconscionable conduct throughout the entire case, and they point to the fact that the Master reduced his original charge of

and shall attach to his report a written copy of the testimony taken by each witness. When testimony is given by the master in chambers the court will, in its discretion, be the judge of such evidence or of any statement made, and may admit or reject such evidence or may be bound by the court in its discretion to accept such evidence or may be bound by the court in its discretion to reject such evidence, and the court may, in its discretion, accept or reject such evidence or may be bound by the court in its discretion to accept such evidence or may be bound by the court in its discretion to reject such evidence.

That his affidavit is supported by the testimony contained as well as by the evidence which was introduced on the hearing in the following:

Witnesses	100.00
Witnesses on re-examination over which there is no conflict	100.00
Folio for each testimony, 2,000 of the same	100.00
Folio of documentary evidence, 100 of the same	100.00
For each of the following:	
Time spent in disposing of evidence of law and fact during hearing, days	100.00
Studying evidence, days	100.00
Studying law and preparing reports, days	100.00
Working on objections, days	100.00
Miscellaneous evidence, writing letters, telephone calls, etc., days	100.00
Total days	100.00
At \$100.00 per day	100.00
It only \$100.00 per day is to be allowed, then deduct	100.00
	100.00

The foregoing is shown to the effect of the master's report that the master is not entitled to any fee in this matter, and that the above computation between all of the witnesses that appear exclusively be objected to and is in error and was not prepared by the master in this case.

The foregoing is shown to the effect of the master's report that the master is not entitled to any fee in this matter, and that the above computation between all of the witnesses that appear exclusively be objected to and is in error and was not prepared by the master in this case.

\$2,990.30 during the course of the hearing to \$2,077.65, a reduction of \$912.64, or approximately one-third of his original charge; and point to an outstanding fact, which the defendants contend, tends to raise a doubt as to his fairness in his persistence in making claims which the testimony at the hearing shows are not justified, and as an example point out that he still claims for 3,342 folios of testimony for 1,337 pages, being at the rate of 2-1/2 folios per page, or \$501.30, when the uncontradicted testimony of Mr. George A. Sepanski was that the total number of folios of testimony is 2,674 folios, and the certificate of the court reporter that this is the correct number of folios. Defendants urge that there is no question but that this was an overcharge, and the Master in his testimony admits that he has no personal knowledge of the correct number of folios and that neither he nor anyone in his office ever made a correct computation of them. On the other hand, defendants contend, Mr. George A. Sepanski, a licensed attorney, and a member of the bar, testified that he made a computation and that the correct number of folios taken is as above stated, namely 2,674 folios. The testimony of this witness is corroborated by the certificate of the court reporter who took the testimony before the Master, which is attached to the Master's report, that the 1,337 pages of the testimony averaged two folios per page, or a total of 2,674 folios.

The defendants further contend that the Master attempts to justify his charge of 2-1/2 folios per page or a total of 3,342 folios by the statement that it is customary to treat each page as containing 2-1/2 folios regardless of the number of folios, and further urge that Masters fees are not governed by custom, but are provided by statute and that the statute must be strictly followed, and cite Fitchburg Steam Engine Co. v. Potter, 311 Ill. 138, and other cases. It is also contended that the Master is not sustained by the evidence on the question of the number of folios that are contained in the documentary evidence. The Master charged for 2,612 folios in his original certificate and now claims that 261 folios is the correct number. The Master's explanation of the

12,300.30 during the course of the hearing at 11,000.00, a comparison of 111.04, or approximately one-third of its original value, and point to an extraordinary fact, which the defendant's counsel, who raised a doubt as to his fairness in his testimony in making these comparisons and the testimony at the hearing shows was not justified, and as the result point out that he still claims for 1,241 folios of testimony for 1,247 folios, being at the rate of 0-1/2 folios per page, or 100.12, when the uncontroverted testimony of Dr. Foster, A. Bismarck, was taken into account of folios of testimony at 1,071 folios, and the defendant at the court to offer that this is the correct amount of folios, and the court that there is no question but that this is the correct amount, and the master in his testimony admits that he has no folios and that the correct number of folios and that he had no folios in his account, never made a correct comparison of folios, and the other side, defendant, contended, Dr. Foster, A. Bismarck, a licensed physician, and a member of the bar, testified that he made a correct comparison of the correct number of folios taken in as above stated, namely 1,071 folios. The testimony of this witness is corroborated by the testimony of the court reporter who took the testimony before the master, whom he attended in the master's report, to the 1,071 folios of the testimony contained in the folios per page, or a total of 1,071 folios.

The defendant further contends that the master's attempt to justify his charge of 0-1/2 folios per page on a basis of 0-1/2 folios by the statement that it is unnecessary to state words used in contradiction of the testimony of the master of folios, and further that words used in testimony are not governed by master, but are governed by master, and that the statute must be strictly followed, and the language in Engine Co. v. Foster, 111 Ill. 180, and other cases. It is also contended that the master is not authorized by the witness on the question of the number of folios that are contained in the documentary evidence. The master charged for 1,071 folios in the original testimony and one-third that 111 folios is the correct number. The master's representation of the

overcharge of \$352.65 is that it was due to a clerical error. It would appear from the evidence that there was some discrepancy between the Master's former charge and that now claimed.

The defendants contend that the Master, because of his conduct, is not entitled to a fee, but submit that the following is a correct computation based on the evidence and the law, under the statute:

The Statutory charge of 15¢ per folio for 2,674 folios of testimony	\$ 401.10
The statutory charge of 15¢ per folio for 183 folios of documentary evidence	27.45
Charge for reporting conclusions of law and fact, 2 days at \$25.00 per day	50.00
For services on re-reference as per stipulation of counsel	<u>97.20</u>
	\$ 575.75

The Court in its order entered in this case allowed the Master \$957.75, being the amount that the court determined from the evidence to be a reasonable allowance for the folio charges and services rendered by the Master in preparing his report and submitting it to the Chancellor for approval. This court, in passing upon the decree that was entered, approved the report in so far as it passed upon the questions of fact that were involved in the litigation. However, there having been no evidence heard on the question of Master's fees, this court reversed that part of the decree and remanded the case for the purpose of giving the Master an opportunity to present evidence upon this question. The facts as they were presented were for the court to determine, and, while there seems to be some discrepancy between the amount that was allowed and the claim that was presented for approval, yet the court, having had all the questions of fact as well as the contentions of the parties before it, passed upon the question, and we are of the opinion that there is sufficient facts that would justify affirmance of the Court's order.

It appears that the petition upon which the hearing was held, and upon which the order appealed from was entered, was filed by the Soft-Lite Lens Co., Inc., a corporation, the plaintiff in the

suit. It prayed that an order be entered fixing the reasonable amount of the Master's fees. The said order entered by the Chancellor did not tax the Master's fees, which the Chancellor found were payable, as costs in favor of the plaintiff, but on the contrary, found that the Master was entitled to have and recover for his statutory fees for his services for examining questions in issue and reporting his conclusions thereon, and entered judgment for said sum of \$957.75 "as costs in favor of the Master and taxed as costs against the defendants." It was further ordered that the Master have execution for said sum, but the defendants did not at that time object to the entry of the order. In the case of German-American Savings, Loan and Building Assoc., et al. v. Trainor, 293 Ill. 483, the Court in its opinion, which has a material bearing upon the question that is called to the attention of this court, said;

"The order of the circuit court of May 20, 1907, fixed master Leaming's fees for his services at \$1018. These fees were subject 'to be taxed as other costs.' (Hurd Stat. 1917, sec. 9, p. 1913.) Even though it be conceded, as argued by counsel for plaintiff in error, that this order provided that plaintiffs in error should only pay half of these costs and that provision could not be changed without a further order of court, there was such an order by the court when the bill was dismissed, 'that the complainants shall pay the costs of this proceeding.' It then became the duty of the clerk of the circuit court, when proper application was made, to tax Master Leaming's fees as costs against the complainants. " * * "

"The trial court had originally exercised its discretion as to the allowance of the Master's fees. Ordinarily the payment of costs is not enforced until final judgment is rendered and the costs have been taxed and inserted therein. (5 Ency. of Pl. and Pr. 254; 15 Corpus Juris, 182.) In this State it has been held a fee bill could be entered against one of the parties without regard to the result of the suit. (Eads v. Gause, 35 Ill. 534.) There were no objections made to the allowance of the fees to the master at the time the order was originally entered, neither was any made as to Leaming's fees at the time the final decree was entered taxing the costs of the case to plaintiffs in error. The original decree of the trial court being appealed to the appellate court, under the authorities the costs could not be retaxed pending the appeal. (15 Corpus Juris, 188.) Pending the appeal the circuit court was without authority to make any order affecting the interests of any of the parties or in any way affecting the costs. (Merrifield v. Cottage Piano Co., 238 Ill. 526, and cases cited.) The satisfaction papers (satisfying the decree) were filed in the circuit court pending the appeal to the Appellate Court, but no one representing master Leaming appears to have had anything to do with the filing of these papers or to have consented in any way thereto, and we do not think the parties could defeat his fees already allowed without his consent or that of his duly authorized representative.

... It proved that an order be entered taxing the reasonable amount
of the Master's fees. The said order entered by the Commissioner did
not tax the Master's fees, since the Commissioner found that the
costs in favor of the plaintiff, and on the contrary, found that the
Master was entitled to have and recover for his ordinary fees for his
services for examining questions in issue and reporting his conclusions
thereon, and entered judgment for said sum of \$500.00 in costs in
favor of the Master and taxed as costs against the respondents. It was
further ordered that the Master have execution for said sum, but the
respondents did not at that time object to the entry of the order. In
the case of German-American Mutual Loan and Building Association v. Lippman, 205 Ill. 483, the Court in its opinion, which does not mention
costs upon the question that is before the court, said:

"The order of the Circuit Court of Cook County, Illinois, dated
Master Lippman's fees for his services as Master, entered upon were
subject to be taxed as costs. (Court's bill, 1917, Dec. 8,
p. 1917.) Even though it be conceded, as stated by counsel for plain-
tiff in error, that this order awarded them plaintiff's costs in error
should only pay half of those costs and that provision would not
be changed without a further order of court, there was such an error
by the court when the bill was amended, 'that the respondents
shall pay the costs of this proceeding.' It then became the duty of
the clerk of the circuit court, upon proper application, to enter
to tax Master Lippman's fees as costs against the respondents."
"The trial court did not finally enter the order as to the
as to the allowance of the Master's fees. Ordinarily the payment of
costs is not enforced until final judgment is rendered and the costs
have been taxed and entered thereon. (See, for example, Ill. Rev. Stat.
§ 103.) In this case it was held that the order entered by the
court could be entered against one of the parties without regard to the
result of the suit. (Wells v. Wells, 22 Ill. 2d, 1917.) There were no
objections made to the order at the time it was entered and no
time the order was finally entered, without any objection being made
Lippman's fees at the time the final judgment was entered taxing the
costs of the case to plaintiff in error. The original order of the
trial court being a bill to the respondents to pay the costs of the
trial the costs could not be entered against the respondents. (Ill. Rev. Stat.
§ 103.) Hence the court's order awarding the costs to the
authority to make an order awarding the costs to one of the
parties or in any way affecting the costs. (Wells v. Wells,
Ill. 2d, 1917, Dec. 8, 1917.) The respondents' fees
(excluding the Master's fees) were taxed as costs against the
respondent to the American Mutual Loan and Building Association
respondent to have and recover for his ordinary fees for his
or to have recovered in any way thereon, and it is not within the
powers of the court to award his fees as costs against the respondents
that of his duly authorized representative."

"The master's fees having been fixed by order of court and the final decree dismissing the bill providing that plaintiffs in error should pay the costs, when these fees were not paid plaintiffs in error were liable for their payment on the fee bill issued against them for their collection. (Camp v. Morkan, 21 Ill. 256). These fees, under the cases already cited, could be collected by fee bill any time within seven years after the rendition of the final judgment; and this would be the proper method even though, under the statute they might be recovered by separate proceedings in assumpsit. (Boyle v. Wilkinson, 120 Ill. 430.) We think the reasoning in this last decision fully answers the argument of counsel for the plaintiffs in error that these fees, conceded to be meritorious, could only be collected by a separate proceeding."

It appears that before being paid, Master Leasing died while the appeal was pending and before the opinion was filed, and that the execution was, therefore, issued on behalf of the executrix of his estate.

When we come to consider the questions here, we find that these costs, which were allowed the Master, were taxed as against the defendants, and not having been objected to at the time the Court entered the order, and applying the reasoning of the Supreme Court in the case of German-American Sav. Ass'n. v. Trainer, 283 Ill. 483, that the order entered was not such an erroneous one that would justify a reversal.

For the reasons stated in this opinion, the order fixing the Master's allowance as provided by statute is affirmed.

ORDER AFFIRMED.

BURKE AND DENIS E. SULLIVAN, JJ. CONCUR.

"The master's fees have been fixed by order of court and the final decree dismissing the bill providing that plaintiff in error should pay the costs, when those fees were not paid plaintiff in error were liable for their payment on the bill issued against them for their collection. (Crawford v. ... 21 Ill. 183.) These fees, under the circumstances, would be collected by the bill any time within seven years after the rendition of the final judgment; and this would be the proper method even though, under the statute they might be recovered by a writ proceeding in rem. (Crawford v. ... 21 Ill. 183.) To claim the return- ing in this last case is fully warranted the amount of costs for the plaintiff in error that costs have, according to be withdrawn, could only be collected by a separate proceeding."

It appears that before being paid, master's fees were due the plaintiff and before the opinion was filed, and that the question was, therefore, issued on behalf of the executor of his estate.

When we come to consider the question last, we find that these costs, which were allowed the master, were taxed as against the defendants, and not having been objected to at the time the bill entered the order, and applying the reasoning of the master Court in the case of Crawford v. ... 21 Ill. 183, that the order entered was not such an error as that could justify reversal.

For the reasons stated in this opinion, the order fixing the master's allowance as provided by statute is affirmed.

ORDER AFFIRMED.

JOHN AND BENJAMIN H. ... 183. ...

41310

SHERMAN B. TAYLOR and HELEN TAYLOR,

Appellants,

APPEAL FROM

CIRCUIT COURT

T. C. FREDRICH, Assignee of Charles H. Albers, Receiver of the Brookfield State Bank, a corporation, and THOMAS J. O'BRIEN, as Sheriff of Cook County, Illinois,

Appellees.

308 I.A. 324²

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order sustaining the motion of the defendant, T. C. Fredrich, to strike the amended complaint of the plaintiffs and dismissing said cause for want of equity. The plaintiffs' complaint is instituted to remove, as a cloud on title to real estate, a judgment entered before a Justice of the Peace and a transcript of which was filed in the Circuit Court of Cook County, Illinois, and to enjoin a sale made under a levy on an execution based upon said transcript.

The amended complaint in this cause alleges that the plaintiffs are the owners of the real estate described therein and that they acquired title thereto as joint tenants by warranty deed dated January 14, 1938. It is further alleged that on May 6, 1935, a suit was instituted before Louis Jaffie, Justice of the Peace, by William L. O'Connell, against Beattie Taylor, sued before said Justice of the Peace as "Betten Taylor"; that a summons was issued in said cause returnable May 23, 1935, and was returned with the endorsement "No Service"; that an alias summons was issued on March 21, 1936, returnable March 28, 1936, and was returned by the constable with the following endorsement;

"Left a copy thereof at place of residence of the within named defendant with J. Taylor a member of her family, of the age of ten years or upwards, in the territory of Cook County, outside of the City of Chicago, the said defendant not being found in any county this 28th day of March, 1936."

It is further alleged that said Justice of the Peace entered a judgment in favor of the said plaintiff and against said defendant in the sum

[illegible]

456.41-002

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

This is an appeal from a judgment of the Circuit Court of the County of Cook, Illinois, in a case styled as follows:

The amended complaint in this cause alleges that the plaintiffs are the owners of the real estate described herein and that they acquired title thereto as joint tenants by purchase from John Taylor, deceased, in 1928. It is further alleged that on May 11, 1935, a writ was instituted before Judge Taylor, Justice of the Peace, by William L. O'Connell, against William Taylor, and return was made thereon in the name of "William Taylor"; that a summons was issued to said Taylor returnable May 25, 1935, and was returned with the endorsement "no service"; that an alias summons was issued on May 11, 1935, returnable May 25, 1935, and was returned by the sheriff with the following endorsement;

"Left a copy thereof at place of residence of said William Taylor defendant with a notice to appear at the court of said county on May 11, 1935, in the territory of said county, outside of the city of Chicago, and said defendant not being found in said county this 25th day of May, 1935."

It is further alleged that said Justice of the Peace rendered a judgment in favor of the said plaintiff and against said defendant in the sum of \$100.00.

of \$365.00 and the costs of the suit; that on April 13, 1936, an execution was issued and returned "No property found and no part satisfied" on April 25, 1936; that on May 28, 1936, a transcript of said judgment was filed in the Circuit Court of Cook County; that an execution was issued out of said Circuit Court on April 16, 1937, which was returned by the Sheriff of Cook County "No Property found and no part satisfied" and with the further endorsement thereon that said DeEttie Taylor lived in Florida. It further appears from the amended complaint that said purported judgment was assigned to the defendant T. C. Fredrich, on September 18, 1939; that an alias execution was issued on said purported judgment on the 18th day of September, 1939, and a levy made on said property; and that at the time of the issuance and purported service of said original summons before said Justice of the Peace, said DeEttie Taylor was a resident of Coral Gables, Florida.

It is further alleged that Section 23, Chapter 79, of Illinois Revised Statutes, 1939, provides as follows;

"When a defendant can not be found, alias summonses may be issued in the same case; and the first and each successive summons may be served by leaving a copy thereof at the place of residence of the defendant with some member of his family of the age of ten years or upwards, until personal service is had on such defendant, or he shall appear upon a return day, when the cause may proceed as in other cases."

There was also a statement alleged in the amended complaint that at the time of said purported service, DeEttie Taylor was not a resident of 96 Quincy Road, Riverside, Illinois, and that there was no member of her family of the name of J. Taylor, and that she did not appear in said cause as required by the Statute; that said judgment rendered before said Justice of the Peace and transcript filed in the said Circuit Court and execution issued thereon are void and of no force and effect; and that unless the Sheriff was restrained from making said levy that plaintiffs would suffer irreparable injury to their property.

For relief, plaintiffs pray that said judgment be declared null and void, cancelled and removed as a lien and cloud upon the title of the plaintiffs; that said judgment and transcript in the Circuit Court of Cook County be declared wholly void and of no force and effect as to

the plaintiffs; and further that an injunction issue restraining defendants from proceeding with a levy and sale of the property.

A motion of the defendant was filed February 15, 1940, alleging that to entitle a grantee of a judgment debtor to relief against a judgment on the ground of fraud, accident or mistake that it is necessary to allege a defense of the original judgment debtor, and that equity will not proceed to interfere with the collection of a judgment even though the judgment was rendered without service of process unless a meritorious defense is shown.

Plaintiffs' theory in this action is that the judgment against which relief is sought is entirely void; that to vest a court with jurisdiction there must be jurisdiction of the person as well as the subject matter. A judgment once void is always void for every purpose; and that since said judgment is void it is a cloud upon their title and should be removed as such.

The reply of the defendant to this contention is that a meritorious defense of a judgment debtor should be asserted by a grantee of such judgment debtor and that equity will not interfere with the collection of a judgment even though there was no service of process unless a meritorious defense is shown. The Sheriff of Cook County filed no appearance in this action.

The plaintiffs contend that to give a court jurisdiction it must have jurisdiction of the person as well as of the subject matter, and, in support of this contention, cite the case of Rabbitt v. Frank C. Weber & Co., 297 Ill. 491, where the court in its opinion said;

"Jurisdiction is of two kinds, - Jurisdiction of the subject matter and of the person, - and both must concur or the judgment will be void in any case in which a court has assumed to act. The difference is that jurisdiction of the subject-matter is given by law and cannot be conferred by consent, but jurisdiction of the person may be obtained by consent. Assuming that the Municipal Court had jurisdiction of the subject matter it must have had jurisdiction of Margaret Fischer and if it had not, the judgment was altogether void and no right of property was divested by means of it."

In support of this contention, the case of Anderson v. Hawke, 115 Ill. 33, is cited. It seems that in that case, from the statement of the facts

the plaintiff; and further that an injunction issue restraining
defendants from proceeding with a levy and sale of the property.

A motion of the defendant was filed February 12, 1900,

alleging that to entitle a grantee of a judgment debtor to relief against
a judgment on the ground of fraud, collusion or mistake there is a
necessity to file a defense of the original judgment debtor, and that
equity will not proceed to interfere with the collection of a judgment
even though the judgment was rendered without notice if no such defense
is shown.

Plaintiff's theory in this motion is that the judgment

is a matter which relief is sought is entirely void; that to grant a motion

with jurisdiction there must be jurisdiction of the person as well

as the subject matter. A judgment once void is never valid for any

purpose; and that since said judgment is void it is a nullity and that

title and should be removed as such.

The reply of the defendant to this contention is that a

meritorious defense of a judgment debtor should be presented by a motion

of such judgment debtor and that equity will not interfere with the

collection of a judgment even though there was no notice of motion

unless a meritorious defense is shown. The denial of such motion being

no appearance in this motion.

The plaintiff's answer filed to give a more jurisdiction is

that have jurisdiction of the person as well as of the subject matter,

and, in support of this contention, cite the case of Smith v. Smith, 11

Cal. 2d 667, 111. 401, where the court in its opinion said:

"Jurisdiction is of two kinds, - jurisdiction of the
subject matter and of the person, - and both must extend to the judg-
ment will be void in any case in which a court has assumed to act.
The difference is that jurisdiction of the subject matter is given
by law and cannot be conferred by consent, but jurisdiction of the
person may be obtained by consent. Jurisdiction of the subject matter
had jurisdiction of the subject matter it must have jurisdiction
of the person as well as of the subject matter, and if it had not, the judgment was a nullity
void and no right of property was thereby acquired by means of it."

In support of this contention, the case of Smith v. Smith, 111. 401,

is cited. It seems that in that case, from the statement of the facts

by the court, that no service of summons was had in said proceeding, but an attorney at law in the name of the defendant filed a demurrer to the declaration and this was relied on by the plaintiff as conferring jurisdiction of the person of the defendant. The evidence showed that the attorney had no authorization by said defendant to enter her appearance, and on cross-examination the attorney admitted that he had no authority to file the demurrer. The court held that the Circuit Court had not acquired jurisdiction of the person of the defendant and had no authority to render said judgment and that said judgment was entirely void for want of service on the defendant.

Plaintiffs further cited the case of Gulver v. Phelps, 130 Ill. 217, and Johnson v. Baker, 38 Ill. 99.

Plaintiffs further call the attention of this court to their contention that a judgment, void for want of jurisdiction, may be attacked by any one affected by it in any and all proceedings, either direct or collateral, and quotes from Bannon v. People, 1 Ill. App. 496, where the Court cited the case of Cambell v. McCahan, 41 Ill. 45, and quoted from that decision as follows:

"There must be jurisdiction of both the subject matter and of the person to give validity to judgments, and if jurisdiction is not acquired the judgment is void and may be resisted successfully, either in direct or collateral proceedings." To the same effect is the case of White v. Jones, 38 Ill. 160."

Plaintiffs further rely on Rabbitt v. F. C. Weber & Co., 297 Ill. 491, contending that it was there held that where a court had no jurisdiction to render a judgment it and all proceedings under it are void and the validity may be disputed collaterally as a basis of title by any person having an interest in the subject matter. In passing upon the question, the court in that case held that by reason of the fact that jurisdiction was not acquired over Margaret Fischer by the Municipal Court that the judgment was void and could be questioned in the proceeding instituted by J. M. Rabbitt.

Defendant urges as one of his grounds that in order to give equity jurisdiction of a complaint to remove a cloud upon title, or to quiet title, the complaint must allege that plaintiffs are in

by the court, that no service of summons was laid in the case, and that an attorney at law in the name of the defendant filed a disclaimer to the decision and that was relied on by the court in its decision. The defendant's jurisdiction of the person of the defendant. The defendant showed that the attorney had no authorization of suit to appear in court for defendant, and no power to bind the defendant. The court said that it had no authority to file the judgment. The court said that the Circuit Court had not assumed jurisdiction of the person of the defendant and had no authority to render said judgment and that said judgment was entirely void and of no effect in the defendant.

Plaintiff further filed the case of Wright v. Wright.

120 Ill. 217, and Johnson v. Johnson, 120 Ill. 217.

Plaintiff further filed the case of Wright v. Wright.

Their contention that a judgment rendered by a court of jurisdiction may be attacked by any one without regard to any and all proceedings, either direct or collateral, was overruled in Wright v. Wright, 120 Ill. 217.

43. Next the court cited the case of Wright v. Wright, 120 Ill. 217.

44. and quoted from that decision as follows:

"There must be jurisdiction of both the subject matter and of the person to give validity to judgments, and if jurisdiction is not acquired the judgment is void and can be attacked successfully either in direct or collateral proceedings. In the case at hand in the case of Wright v. Wright, 120 Ill. 217.

Plaintiff further filed the case of Wright v. Wright, 120 Ill. 217.

contending that it was void and that no jurisdiction to render a judgment of and all proceedings order of the court and the validity may be attacked collaterally as a matter of right by any person having an interest in the subject matter. It was held that the judgment the court in that case was void and that no jurisdiction was acquired over the person of the defendant and that the judgment was void and could be attacked in the proceedings instituted by J. A. Wright.

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Plaintiff further filed the case of Wright v. Wright, 120 Ill. 217.

possession of the premises involved, or that said premises are vacant and unoccupied. Upon this point plaintiff urges that an order was entered by this court on June 25, 1940, as follows;

"It is hereby ordered that leave be and is hereby granted unto plaintiffs to amend their amended complaint herein by inserting after the first paragraph and before the second paragraph thereof the following:

'Plaintiffs further allege that said premises are improved with a two story frame building, and that said premises with the improvements located thereon are of the value of, to-wit, Five Thousand Dollars (\$5,000.00); that plaintiffs are in actual possession of said premises and have had actual possession thereof for more than five years preceding the filing of this amended complaint.'"

and urges that the defendant did not raise this question in the trial court and cannot raise the question for the first time in this court. That being the rule it will not be necessary to discuss this feature of the case called to our attention by the defendant.

The defendant urges that he has a judgment against DeEtzie M. Taylor, and that she, together with the present plaintiffs, filed a complaint in the Circuit Court seeking to set aside the judgment held by defendant, Fredrich. The ground alleged was that there was no service of process on the said plaintiff, DeEtzie M. Taylor. The defendant thereupon moved to dismiss the complaint because of the failure to allege that there was a meritorious defense to the claim upon which the judgment was based, whereupon an order was entered in the trial court dismissing DeEtzie M. Taylor as a plaintiff and granting leave to the remaining plaintiffs, Sherman B. Taylor and Helen Taylor, his wife, to file an amended complaint. These plaintiffs then alleged in their amended complaint that the plaintiffs are the owners of the real estate described therein and that they acquired title thereto as joint tenants by warranty deed dated January 14, 1938.

The written motion of the defendant, T. O. Fredrich, states the grounds upon which he based his motion to strike the plaintiffs' amended complaint, and in that motion he states as the grounds that he urged upon the trial court, the following; (1) That to entitle grantee of a judgment debtor to relief against a judgment on the ground of fraud, accident or mistake it must be evident that such judgment debtor

possession of the premises involved, on that date by virtue of the
and unoccupied. Upon this point, Plaintiff admits that on or about
entered by this court on June 11, 1934, as follows:

"It is hereby ordered that the parties to this case shall
into Plaintiff to whom shall be made a return by Plaintiff
after the first payment and before the second payment made
the following:

"Plaintiff further agrees that it shall construct a building
with a two story frame building, and that it shall construct
improvements located thereon to the value of, at least, five
thousand dollars (\$5,000.00); that Plaintiff is in actual possession
of said premises and have not received a demand for same
then five years preceding the filing of this second complaint."

and urges that the defendant has not taken this action in the trial
court and cannot raise the question for the first time in this court.
That being the rule it will be necessary to dismiss this complaint
of the case called to our attention by the learned judge.

The defendant moves that he be set as judgment creditor herein.

M. Taylor, and that she, defendant, file the second complaint, return

a complaint in the district court seeking to set aside the judgment

held by defendant, Frederick. The court allowed that there was no

service of process on the said Plaintiff, against M. Taylor. The

defendant thereupon moved to dismiss the complaint because of the failure

to allege that there was a sufficient defense to the claim upon which

the judgment was based, whereupon an order was entered in the trial

court dismissing the case. Taylor as a Plaintiff and defendant moved

to the remaining complaint, Frederick M. Taylor and M. Taylor, and

wife, to file an amended complaint. These complaints were allowed in

their amended complaint that the Plaintiff is not the owner of the real

estate described therein and that they have no title thereto as joint

tenants by entirety and dated January 16, 1934.

The written motion of the defendant, T. A. Taylor, stated

the grounds upon which he moved his motion to set aside the judgment

and set aside the judgment, and in that motion he stated as the grounds that he

urged upon the trial court, the following: (1) That in writing the

of a judgment debtor to relief against a judgment on the ground of

fraud, accident or mistake it may be required that such judgment debtor

has a defense on the merits and that such defense has been lost without his own omission, negligence or default, whereas in the amended complaint filed herein there are no allegations with reference to any defense on the merits that the judgment debtor, Beattie Taylor, has to said judgment, and then (2) that equity will not interfere to prevent collection of a judgment even though the judgment was rendered without service of process unless a meritorious defense is shown, and no meritorious defense to said judgment is shown by the complaint filed herein. The rule that applies on this question is settled in this State that no relief will be granted to a judgment debtor against a judgment unless such judgment debtor sets up a meritorious defense to the claim upon which the judgment is entered, the question having been passed upon by several cases in this State. In the case of Reed v. New York Exchange Bank, 230 Ill. 50, The Court in its opinion, said;

"In this case appellant seeks to restrain the revival and enforcement of a judgment at law against him. He places great reliance upon the allegations in his bill that no process was served upon him in the proceedings resulting in the judgment, and that he had no knowledge of the proceedings or of the judgment until after the expiration of the time allowed for the prosecution of an appeal or writ of error. It is the well settled rule of law in this State that courts of equity will not interfere to prevent the collection of a judgment, even though the judgment was rendered without service of process, unless a meritorious defense be shown. (Colson v. Leitch, 110 Ill. 504). It would be useless to set aside a judgment at law unless it is shown that there would be a different result upon another trial at law. (Colson v. Leitch, supra; Telford v. Brinkerhoff, 163 Ill. 433.) It is not sufficient that a judgment is irregular, but it must be unjust before equity will interfere. A showing in the bill for injunction that the judgment in question was obtained without process does not show, nor tend to show that if process had been served and defense interposed the result of the suit would have been different."

This Court also passed upon a like question in the case of Lang v. Smith, 238 Ill. App. 196. A judgment in that case was obtained before a justice of the peace, without any proper service of process upon the defendant. Then defendant filed a bill in the Circuit Court to set aside said judgment and for an injunction. Upon the granting of an injunction restraining collection of the judgment, the plaintiff in the judgment appealed, and in deciding the case this court said;

"The main ground relied on by appellants for reversal of said order or decree is that said bill of complaint nowhere alleges that appellee has a good and valid defense to the claim of appellant, Smith, and that without such allegation his bill is wholly inadequate to warrant the relief prayed. We are of the opinion and hold that this contention is well taken."

"It has been repeatedly held by the Supreme and Appellate Courts of this State that a court of equity will not enjoin a judgment at law unless it clearly appears from the allegations of the bill that the complainant therein has a meritorious defense; in other words, that if a trial on the merits be had, a different result would be obtained from that already adjudged."

Other cases have been called to our attention in support of this rule, which are as follows; Cadillac Automobile Co. v. Boynton, 240 Ill. 171; Gurran v. Good, 204 Ill. App. 236; Adams & Figgott Co. v. Allen, 228 Ill. App. 230.

Applying the rule as approved by the appeal courts, in this case it is apparent that Beattie M. Taylor could not have successfully maintained her complaint to set aside the judgment against her, so long as her complaint did not allege a meritorious defense to the claim upon which the judgment was based. The question, however, that is to be considered is whether, since Beattie M. Taylor could not obtain relief without alleging a meritorious defense to the claim upon which the judgment was based, can her grantees obtain the relief that she could not obtain. It appears from this record that Beattie M. Taylor conveyed the property to Sherman B. Taylor and his wife, Helen, her son and daughter-in-law, and this conveyance did not give the plaintiffs any greater rights than Beattie M. Taylor had. There is no allegation that indicates that the plaintiffs have any superior equity, and could not, therefore, assail the judgment by the facts as they have stated them. As to whether the plaintiffs are bona fide purchasers as contemplated in Section 5 of the Act on Frauds and Perjuries does not appear from this amended complaint. In the case entitled Roseman v. Miller, 84 Ill. 297, the court in that case held that although one may purchase land without notice of the equities of another, yet if he takes the deed as a volunteer and has not paid the purchase money he is not an innocent purchaser for value and cannot be protected; that as against a third

[illegible][illegible]

party claiming an equitable right he must prove that he paid the purchase money, - - and this independently of the recitals in his deed. See also, Walt v. Smith, 92 Ill. 385; Grover v. Hale, 107 Ill. 638; Simmons Creek Coal Co. v. Doran, 143 U. S. 417.

After consideration of the facts as well as the cases that were cited, we feel that the plaintiffs should have alleged facts in defense of the judgment against DeEtzie M. Taylor, which judgment it is claimed was rendered without the service of summons on DeEtzie M. Taylor. The rule is as we have stated it, and we believe that if the plaintiffs had pleaded any defense which DeEtzie M. Taylor might have had, if any, the Chancellor would not have sustained the motion to strike the amended complaint, but not having alleged any facts indicating a defense to the judgment, we believe that, under the circumstances of this case and the authorities, the Court did not err in dismissing the complaint for want of equity.

In conformity with the views herein expressed, the decree is affirmed.

DECREE AFFIRMED.

BURKE AND SULLIVAN, JJ. CONCUR.

party claiming an equitable right to have the land sold and
 purchase money, - and this instrument is in the name of the
 also, Wright v. Wright, 94 Ill. 2d 111, 113, 115, 117, 119, 121, 123, 125, 127, 129, 131, 133, 135, 137, 139, 141, 143, 145, 147, 149, 151, 153, 155, 157, 159, 161, 163, 165, 167, 169, 171, 173, 175, 177, 179, 181, 183, 185, 187, 189, 191, 193, 195, 197, 199, 201, 203, 205, 207, 209, 211, 213, 215, 217, 219, 221, 223, 225, 227, 229, 231, 233, 235, 237, 239, 241, 243, 245, 247, 249, 251, 253, 255, 257, 259, 261, 263, 265, 267, 269, 271, 273, 275, 277, 279, 281, 283, 285, 287, 289, 291, 293, 295, 297, 299, 301, 303, 305, 307, 309, 311, 313, 315, 317, 319, 321, 323, 325, 327, 329, 331, 333, 335, 337, 339, 341, 343, 345, 347, 349, 351, 353, 355, 357, 359, 361, 363, 365, 367, 369, 371, 373, 375, 377, 379, 381, 383, 385, 387, 389, 391, 393, 395, 397, 399, 401, 403, 405, 407, 409, 411, 413, 415, 417, 419, 421, 423, 425, 427, 429, 431, 433, 435, 437, 439, 441, 443, 445, 447, 449, 451, 453, 455, 457, 459, 461, 463, 465, 467, 469, 471, 473, 475, 477, 479, 481, 483, 485, 487, 489, 491, 493, 495, 497, 499, 501, 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ELSTON FUEL CORPORATION,

APPEAL FROM

Appellee,

MUNICIPAL COURT

DIAMOND COAL COMPANY, a corporation,

Appellant.

OF CHICAGO.

308 I.A. 325

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff filed its action at law against the defendant to recover property damages occurring by reason of the collision of its truck with that of defendant at about 2600 Elston Avenue, Chicago, Illinois; and there was also a counterclaim by defendant arising out of the same transaction in and by which the defendant sought to recover property damages from plaintiff for injury to its truck. The case was tried before a jury and a verdict rendered finding the defendant guilty and assessing plaintiff's damages at the sum of \$923.56, and finding the plaintiff not guilty on the counterclaim. Motions were made by defendant for a directed verdict, for a new trial, and in arrest of judgment, which motions were denied and judgment entered on the verdict.

The facts are, as appears from this record, that on December 10, 1938, at about 2600 Elston Avenue, Chicago, a street which runs there in a northwesterly and southeasterly direction, two trucks collided, one a sand truck owned by the plaintiff and the other a coal truck, the property of the defendant. This suit is the result of that collision, with each side claiming its respective right to recover damages for the resultant injuries to their trucks. On the day in question defendant's driver, R. V. Reum, was loading his coal truck with ten tons of coal; he had put on five tons of coal, weighed it in the yard and then pulled out of the yard onto Elston Avenue, planning to turn around, enter the yard and put on another five tons of coal. It was in making this turn that the accident happened and his truck, therefore, was loaded with five tons of coal at the time. He had pulled out of the yard, turned right and was facing south on Elston Avenue when he stopped, with the cab or door just about over the railroad tracks. He saw a street

808 T.A. 325

the defendant filed its motion in the court and the plaintiff
 to recover property damaged by reason of the collision of the
 truck with the defendant's car on the night of the collision
 Illinois; and there was also a deposition of the defendant
 of the same transaction in and to which the defendant sought to recover
 property damaged from plaintiff for injury to the truck. The case
 was tried before a jury and a verdict rendered in favor of the
 plaintiff and excessive damages were awarded to the plaintiff, and
 finding the plaintiff not guilty of the collision. The plaintiff
 y defendant for a directed verdict, but the court refused to grant
 of judgment, which action was denied and judgment entered on the verdict.
 The facts are, as stated in the brief, that on
 December 12, 1928, at about 7:00 p.m. in the city of Chicago,
 there was a collision between the defendant's car and the
 plaintiff's car, one of which was owned by the plaintiff and the other a
 truck, the property of the defendant. The result of the
 collision, with each side claiming its responsibility for the
 damages for the negligent injuries to their property. On the day of the
 defendant's driver, J. V. [redacted], was holding the coal truck with the
 of coal; he had not at the time of the collision, as the truck and
 then pulled out of the yard into the street, according to both
 enter the yard and put on another load of coal. It was in making
 this turn that the accident happened and the truck, defendant, was
 with five tons of coal at the time. The coal truck was at the time
 turned right and was backing away as it was backing away to the
 the car at that time must have been in the street. The car driver

car about 300 feet away and there was no traffic going south at that time. This street car was going in a northwesterly direction on Elston Avenue, which was the direction Baum wanted to be going after completing his turn. About a block behind the street car there was some traffic. The street car pulled up and stopped and he proceeded in front of the street car finishing his "U" turn. From his evidence it appears that the street car was fifteen or twenty feet south of him when it stopped, and that he then proceeded across the tracks; that he did not see the sand truck until he made the turn, when he saw it alongside the street car and about fifteen feet from his truck. It appears further from his evidence that his truck and trailer were about twenty-six or twenty-seven feet long and at the time of the accident he was facing north but not due north because he had not completed the full swing, but that the front end of his tractor was about fifteen or twenty feet away from the street car at that time; and further, that the sand truck was traveling at twenty-five or thirty miles an hour and collided with defendant's truck, striking the right corner of the cab on the opposite side from where he was sitting and behind him.

It appears from the cross-examination of this witness that he did not see the sand truck because it must have been alongside the street car, and that when he saw the sand truck it was then twenty or thirty feet down the street and going about twenty-five miles an hour and was in the space between the street car and the east curb of Elston Avenue; that the first time he looked after he started across the car tracks was when he got in front of the street car where he could see, and that his wheels were then about six feet from the east curb and he was making a turn going north, and that he was on an angle of practically forty-five degrees.

The evidence of plaintiff's driver is that on the day in question he was hauling a load of between seventeen and eighteen tons of lake sand in a 1937 model Autocar truck, and that he was familiar with Elston Avenue near the 2600 block and that there are no intersecting

[illegible]

streets into Elston Avenue between Fullerton Avenue on the south and Logan Boulevard on the north. He described the railroad track which crossed Elston Avenue at about the 2600 block, where this collision occurred. He further testified that that day was a nice, dry, sunshiny and warm day, and said that he was driving northwest along the curb on Elston Avenue because there were no cars parked there; that his truck was well equipped with six wheel air brakes and with a governor set at twenty-nine miles an hour; that he was driving about eighteen miles an hour before he reached the place where the accident happened, that he saw nobody waiting to get on or off the street car and slowed down his truck but started up again and passed alongside the street car without stopping, although he knew of the railroad crossing and that the street car was slowing up for a stop, that he kept watching to see if anybody was getting off the street car and he did not see defendant's truck until the street car had stopped. It also appears from his testimony that he was passing by the street car when it was standing still, that he just slowed down and coasted along and that he could stop in eight feet on a dry pavement with that truck carrying eighteen tons of sand; and also, that the street car stopped about twenty five feet back from the railroad tracks, that it slowed down first and after the coal truck cut him off the motorman made a dead stop and that he was then five or six feet from the railroad tracks.

Plaintiff's driver further testified that he did not see anything coming and that all he was watching was to see if anybody got off the street car, that he did not look at the other side, and further that he was half a length of the street car from the coal truck when he saw it the first time. He further testified that he did not know where the coal truck came from; it came from the left and cut off the street car in front and stopped in front of plaintiff's truck; that he came from behind the street car from the left side of plaintiff's driver; that he watched the coal truck from the time he first saw it until the accident happened; and that he was six or seven feet from the coal truck when he first saw it.

[illegible]

There is evidence in the record on the part of the street car motorman, a witness, that he witnessed this accident; that he was just making a stop - - to stop twenty-five feet from the railroad crossing at about 2600 Elston Avenue, when he saw defendant's truck; that it was then on the west side of Elston Avenue facing south in the opposite direction from the line of travel of the street car; that defendant's truck then started up and made a left "U" turn in front of the street car; that it was about three feet from the street car when it passed in front and that the witness continued to watch it to the point where the impact occurred; that he would say it was about five feet from the east curb of Elston Avenue at the time of the impact; that the left front corner of the sand truck hit the right rear corner of the cab of the coal truck; that the coal truck was a tractor and trailer unit, and that they were about five feet from the east curb line of Elston Avenue at the moment of impact; that the trucks did not travel over two or three feet after the collision. It further appears that, on cross examination, the street car motorman testified further that after the accident the sand truck was about five or six feet north of the railroad track and that the trailer of defendant's truck was clear of the track by about five or six feet and was still on a little slant; that the witness stopped twenty-five to thirty feet south of the railroad tracks; that defendant's driver continued on with his turn in front of the street car and had plenty of time to get across; that after the truck had completely cleared the street car track and was facing almost directly north that it was then about twenty or twenty-five feet from the witness; that the coal truck was about twenty-five or thirty feet in length and at the time of the accident the rear end of the coal truck was about twenty feet north and was still in a turn; that there were no passengers getting on or off the street car at that point and that it was about twenty feet from the street car tracks to the curb.

There was also a witness, for the plaintiff, who was a chauffeur for the Chicago Evening American, who testified that he was going southeast on Elston Avenue and saw the vehicles that came

There is no other way to the front of the building than by the street. The building is situated on the corner of the street and the alley. The alley is a narrow way between the building and the street. The building is a two-story structure. The street is a wide, paved way. The alley is a narrow, unpaved way. The building is made of brick. The street is made of asphalt. The alley is made of dirt. The building is situated on the corner of the street and the alley. The alley is a narrow way between the building and the street. The building is a two-story structure. The street is a wide, paved way. The alley is a narrow, unpaved way. The building is made of brick. The street is made of asphalt. The alley is made of dirt.

together, that the coal truck made a left turn in front of the street car and crossed the northwest bound track still in that direction, approximately north, and that it made no stop from the time it came out of the coal yard, that it did not appear to have changed its direction at any time before the accident; also that the coal truck was traveling about twelve to fifteen miles an hour; that the witness saw the street car before the accident occurred and it came to a stop at the railroad tracks, which all the cars do at that point; that the street car started up and went about one to three feet and then stopped suddenly and allowed this coal truck to pass over in front of it, and that it was from one to three feet in front of the street car when it passed.

Plaintiff filed a motion praying that an order might be entered by this court dismissing this appeal, which after consideration, this court reserved to a hearing. The defendant, it is suggested by the plaintiff, filed its notice of appeal in the office of the Clerk of the Municipal Court of Chicago on the 9th day of March, 1940, and did not file a praecipe for a trial court record or serve notice of the filing of said praecipe within 10 days as provided for under Rule 1 of the Rules of the Appellate Court, First District of Illinois, but that defendant, on March 27th, 1940, eighteen days after the filing of the notice of appeal, filed its praecipe for a trial court record together with notice of filing of said praecipe in the office of the Clerk of the Municipal Court. The defendant further urges in support of its motion to dismiss that the final order in the Municipal Court of Chicago was the overruling of defendant's motion for a new trial and that said order was entered on February 23, 1940; and that the Municipal Court of Chicago approved the appeal bond of the defendant on March 28, 1940, this bond having been filed in the office of the Clerk of the Municipal Court of Chicago on March 23, 1940, but not filed in open court; that on March 28, 1940, the judge of the Municipal Court entered an order approving the appeal bond, nunc pro tunc as of March 23, 1940; said order of nunc pro tunc not being based upon any memorandum made by the court so as to permit the proper entry of such order. The

together, that the coal found was a lot more than in the other
set and crossed the defendant's house again in the morning,
approximately north, and that it was in fact the same as the
of the coal yard, that it was in fact the same as the
at any time before the morning; also that the coal found was
about twelve to fifteen miles away; from the witness who was
out before the accident occurred and it seems to be a fact in the
tracks, which all the cars he at that time, that the
started up and went about one to three feet and then
and allowed the coal found to be in fact in fact in fact in
was from one to three feet in fact in fact in fact in fact
plaintiff filed a motion to set aside the verdict and
entered by this court dismissing the appeal, with costs, and
this court reversed to a hearing. The defendant, if it is
the plaintiff, filed its motion in the office of the clerk
of the Municipal Court of Chicago on the day of March, 1940, and
did not file a petition for a writ of habeas corpus or any other
the filing of said petition which is given by section 10-1-1
of the Rules of the Appellate Court, that section of Illinois, but
that defendant, on March 27th, 1940, withdrew after the filing of
the notice of appeal, filed its motion for a writ of habeas corpus
together with notice of filing of said motion in the office of the
Clerk of the Municipal Court. The defendant further states in support
of its motion to dismiss that the trial court in the trial of the
of Chicago was the overruling of the jury's verdict for the plaintiff
that said order was entered in January, 1940, and that the defendant
Court of Chicago rejected the appeal from the trial court on March 28,
1940, this bond having been filed in the office of the Clerk of the
Municipal Court of Chicago on March 27, 1940, and not filed in any other
that on March 28, 1940, the Clerk of the Municipal Court issued an
order approving the appeal from the trial court on March 28, 1940;
said order of March 28, 1940 not being correct under the provisions made
of the court so as to make it correct under the provisions made.

questions that have been called to our attention in support of this motion have been passed on by this court in the case of Harris v. Sovereign Camp of Woodmen, Inc., etc., 302 Ill. App. 310, where this court said:

"It should be observed by this Court in this connection that there is no provision of the Practice Act, or of the rules of court, which specifically directs the dismissal of an appeal if the praecipe for record is not filed within the 10 day period referred to in the rule above recited. It should also be understood that the filing of notice of appeal is the only jurisdictional step required by the Civil Practice Act (162 E. Ohio Street Hotel Corp. v. Lindheimer, 368 Ill. 294) * * *. While adherence to the rule governing the time for the filing of the praecipe is desirable and should in all cases be pursued by appellants, unless it can be shown on appeal that an appellee is actually prejudiced through the failure to file such praecipe for record in apt time, this court feels that appeals should not be dismissed upon that ground alone."

Now, as to plaintiff's second point, that the appeal bond, although filed in apt time, was approved after the expiration of 30 days from the date of the entry of the final order, it is also answered by the Supreme court in the case of 162 East Ohio Street Hotel Corporation v. Lindheimer, 368 Ill. 294, where the court specifically held that the filing of the notice of appeal is the only jurisdictional step required by the Civil Practice Act. It does not appear from anything in the record that plaintiff suffered any injury due to the late filing of the praecipe, nor is any complaint made as to the sufficiency of the bond or any reason why the court would not have approved the bond at the time of its filing. From the suggestions by the defendant, it appears that the bond itself bears the file mark of the Clerk of the Municipal Court and is sufficient memorandum to permit the proper entry of a nunc pro tunc order as of the date of filing. So that, from the cases that we have cited, this court would not be justified in dismissing the appeal on the grounds urged.

It is the contention of the defendant that, taking all the testimony in the light most favorable to the plaintiff, it is obvious that this accident was caused, or at least contributed to, by the negligence of the driver of plaintiff's truck; that the minds of all reasonable men must agree that there was a total lack of proof that plaintiff was in the exercise of due care for its own property, but that, on

[illegible]

1997

10-11-68

Nov. 28 - 1967

by the Bureau Court in the case of [redacted]

[illegible]

It is the conviction of the Government that

[illegible]

negligence of the driver of vehicle B caused the death of A.

It is in the exercise of the right for the use of property, and the right of reasonable and just compensation for the use of the property, that the right of the State to regulate the use of property is involved.

the contrary, plaintiff's driver was in a perilous position without a clear view and traveling at a high speed with a heavy load.

As we have indicated, the contention of the defendant is that taking all of the evidence most favorable to the plaintiff, it is not sufficient to justify the entry of the judgment by the court on the verdict of the jury. However, when we come to consider the facts that appear in this record, it is apparent that the questions involved were proper for a jury to consider. The question here is upon the negligence of the individuals involved in this litigation and as to whether the plaintiff was in the exercise of due care and caution for the property that was damaged. The defendant cites the case of Kerchner v. Davis, 183 Ill. App. 600, upon the question that plaintiff's driver failed to comply with the provision of the statute, and it was, therefore, necessary under all the circumstances that are involved in this litigation, and was his duty, to have his machine under control and if necessary, to avoid accident and injury to others, to stop it altogether, well, that is one of the questions that were passed upon by the jury. While it is true that it is the duty of a driver to comply with the provisions of the statute entitled "Motor Vehicles", Ch. 95-1/2, Art. 11, Ill. Rev. St. 1939, such as we have before us, never-the-less, under the circumstances and facts that appear from the evidence, we are of the opinion that that was also a fact for a jury to pass upon. Of course, it was the duty of the plaintiff's driver to use due care and caution in the operation of the sand truck. Now then, the question whether he maintained an outlook is also one for a jury as well as it was for the jury to pass upon the question as to whether the defendant, in making a so-called "U" turn in front of the street car while plaintiff was approaching the street car, kept a proper outlook. We can not see from the facts and circumstances as we have them in this record that the plaintiff was guilty of contributory negligence as a matter of law, but feel that the driver of the coal truck and trailer in making that turn in front of the approaching street car was a question the jury had

the contrary, Plaintiff's brief was in a certain position almost
 a clear view and showing of a clear record with a heavy load.
 as we have indicated, the construction of the contract is
 not taking all of the evidence into account in the contract, it is
 not sufficient to justify the entry of the judgment in the court in
 the verdict of the jury. However, when we come to consider the facts
 that appear in this record, it is apparent that the questions involved
 were proper for a jury to consider. The questions were in such the
 negligence of the individuals involved in this litigation and as to
 whether the plaintiff was in the exercise of due care and caution in
 the property that was damaged. The defendant filed the case of Billings
v. Davis, 182 Ill. App. 600, when the question is a negligence claim
 related to closely with the violation of the statute, and it was, there-
 fore, necessary under all the circumstances that the plaintiff in this
 litigation, and was his duty, to have his machine and a control for it
 necessary, to avoid accident and injury to others, to stop it
 will, that is one of the questions that were raised in the jury.
 while it is true that it is the duty of a driver to comply with the
 violations of the statute entitled "Motor Vehicle", Ill. Rev. Stat., 1907,
 1, Ill. Rev. Stat. 1909, which we have before us, notwithstanding, under
 the circumstances and facts that appear from the evidence, we are of
 the opinion that that was also a jury question in this case, and
 further, it was the duty of the plaintiff's driver to use due care and
 caution in the operation of the same vehicle, and that, the question
 whether he maintained an unlawful speed was also a jury question and it
 was for the jury to pass upon the question as to whether the defendant
 was acting in a so-called "rash" form in terms of the statute and this plain-
 tiff was approaching the answer that it is a jury question. We now say
 as from the facts and circumstances as we have taken in this record that
 the plaintiff was guilty of contributory negligence as a matter of law,
 at least that the driver of the motor truck was negligent in making this
 turn in front of the approaching street car and a question the jury had

to pass upon as to whether he was careful and kept a lookout when he made the turn in the manner indicated. We are satisfied that the jury under the circumstances was justified in finding for the plaintiff.

The only other question we have before us is whether the court should have instructed the jury with reference to the statute in regard to stopping behind street cars. Defendant contends that one of the instructions which was refused tells the jury in the language of the statute that a vehicle overtaking a street car stopped or about to stop to receive or discharge passengers, shall stop at least ten feet to the rear of the nearest running board or door of such street car, and thereupon remain standing until all passengers have boarded or alighted and reached a place of safety, except in case a safety zone has been established when it may proceed past such car at a speed not greater than is reasonable or proper and with due caution for the safety of pedestrians. However, it does not appear from the evidence that there were any passengers on the street about to board the car, nor that any passengers alighted or were discharged from the street car; and then, it is necessary to consider that the street car was not at a street intersection but was approaching a railroad crossing. It does appear, however, from the evidence that the sand truck was proceeding in a manner so that the driver had control if anyone attempted to get on or off the street car.

We do not believe that there was any error in the court's refusing to give this instruction on the question of the operation of a truck approaching a street car. It does not seem that the failure to give this instruction was such error that would justify this court in reversing the judgment.

Having considered the case, we believe that there is no error in the record that would justify reversing the judgment; therefore, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE AND DENIS E. SULLIVAN, JJ. CONCUR.

to pass upon us to whether we were negligent and that a verdict should be rendered in the turn in the manner indicated. It was decided that the jury under the circumstances was justified in finding for the plaintiff.

The only other question we have before us is whether the court should have instructed the jury with reference to the finding in regard to stopping behind street cars. Defendant contended that one of the instructions which was refused tells the jury in the language of the statute that a vehicle overtaking a street car stopped or about to stop to reverse or discharge passengers, shall stop at least ten feet to the rear of the nearest running vehicle or car of road street car, and thereupon remain standing until all passengers have boarded or alighted and reached a place of safety, except in case a safety zone has been established when it may proceed past such car at a speed not greater than is reasonable or proper and with due regard for the safety of pedestrians. However, it does not appear from the evidence that there were any passengers on the street car at the time it was overtaken, and then, it is necessary to consider that the street car was not at a street intersection but was approaching a railroad crossing. It does appear, however, from the evidence that the street car was proceeding in a manner so that the driver had control of the car and could stop on or off the street car.

We do not believe that there was any error in the court's refusing to give this instruction on the question of the operation of a truck approaching a street car. It does not seem that the failure to give this instruction was such error that would justify this court in reversing the judgment.

Having considered the case, we believe that there is no error in the record that would justify reversing the judgment; therefore, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILLIAM L. HARRIS, J., DENEY.

41389

ALLEN L. HATCHER,

Plaintiff and Counter-defendant,

Appellant,

OSCAR SNYDER,

Defendant and Counter-plaintiff,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

308 I.A. 325²

MR. PRESIDING JUSTICE HERBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff appeals from a decree denying his complaint as alleged that an injunction issue. The defendant in this action filed his answer to the complaint and filed his counterclaim in which he alleged the existence of a partnership to own and operate an undertaking business between the plaintiff and the defendant, and prayed for a money judgment, the dissolution of the partnership, an accounting, an injunction and other relief. The cause was placed at issue and came on for trial before the Chancellor without a jury. Evidence was heard in open court and a decree was entered in which the Court found that there existed a partnership agreement between the plaintiff and the defendant in the undertaking business known as Barbour & Gustin, located at 4141 Cottage Grove Avenue, Chicago, Illinois; that the allegations of the counterclaim were substantially true and that the defendant and counter-plaintiff, Oscar Snyder, is entitled to the relief prayed for in said counterclaim. The decree then fixed a money judgment against the plaintiff, dissolved a temporary injunction, appointed a receiver and referred the cause to a Master in Chancery to take an accounting of the said partnership business.

There is no point raised as to the pleadings filed by the parties in this case, and it was upon the pleadings filed and the evidence heard that the decree was entered.

The plaintiff's theory is that no valid partnership agreement existed between the parties for the reason that the defendant Snyder did not possess a license as a funeral director and could not execute a

ALLEN L. HATTON,

Plaintiff in Error - Respondent

vs.

JOHN A. BAKER,

Defendant in Error - Appellant

Appeal.

2081 A. 325

1. THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF ARIZONA, in and for the County of Pima, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the said court.

The plaintiff herein is John A. Baker, formerly of the County of Pima, Arizona.

as alleged that on September 1900, the defendant in this action filed his answer to the complaint and filed his counterclaim in which he

alleged the existence of a partnership between the plaintiff and himself in the business of

business between the plaintiff and the defendant, and alleged that

any judgment, the dissolution of the partnership, in consequence, as

injunction and other relief. The court was asked to issue and then on

for trial before the undersigned without a jury. Evidence was taken in

open court and a decree was entered in which the Court found that there

existed a partnership between the plaintiff and the defendant

in the undertaking business known as "Baker & Hatton", located at 1141

Cottage Grove Avenue, Phoenix, Arizona; and the dissolution of the

partnership was accordingly decreed and that the defendant was awarded

plaintiff, Oscar Bryant, is entitled to the relief prayed for in this

counterclaim. The record then filed a copy of the judgment and the

plaintiff, dissolved a temporary injunction, dissolved a partnership and

referred the cause to a master in equity to take an account of the

and partnership business.

There is no point raised in the motion filed in the

parties in this case, and it was upon the foregoing that the within

heard that the record was entered.

The plaintiff's theory is that no valid partnership agreement

existed between the parties for the reason that the defendant was not

not possessed a license as a licensed physician and could not practice a

valid agreement to carry on or conduct a partnership in the undertaking business; and further, it is suggested, that if any attempt was made to execute a partnership agreement, such an agreement is invalid and the Court should not enforce the same.

The defendant contends on the other hand that there is a valid partnership agreement and, that the court acted properly in finding such to be the case and in granting relief for its enforcement.

From the facts, it appears that on the 22nd day of August, 1939, the plaintiff and defendant entered into a purported agreement. In this agreement, it is recited that whereas the plaintiff Thatcher had on August 11, 1939, purchased from one Fred Drew the latter's interest in the undertaking business conducted under the name of Barbour & Gustin, located at 4141 Cottage Grove Avenue, Chicago, Illinois; (the said business prior to said August 11th, having been owned jointly by the said Thatcher and the said Fred Drew) and the purchase price of said interest of Drew was \$1,500; and the said purchase by the party of the first part of the interest of the said Fred Drew in the aforesaid undertaking business was made by the plaintiff on behalf of the defendant, Snyder; that the defendant Snyder had paid the sum of \$750.00 cash to the plaintiff, Thatcher; and it was the intention of both parties to carry on the undertaking business and for that purpose to form a partnership; it was, therefore, agreed by and between the plaintiff and defendant that the said purchase by the plaintiff, of the said interest of said Drew, was made for and on behalf of the defendant, Snyder, and that the cash amount of \$750.00 was advanced by Snyder. The contract further provided that

"both parties will become equal owners of said business and to evidence said partnership will enter into a partnership agreement respecting said business.";

and further that the second party (meaning the defendant) agrees that his interest in one-half of the business is subject to the prior lien of Thatcher for the sum of \$750, lent to defendant, Snyder, by Thatcher, and Snyder agreed to execute a note to Thatcher for the said balance

valid agreement to carry on or conduct a partnership in the undertaking business; and further, it is suggested, that if any agreement was made to execute a partnership agreement, such an agreement is invalid and the Court should not enforce the same.

The defendant contends that the Court should not enforce the invalid partnership agreement and, that the Court should merely in finding each to be the case and in granting relief for the defendant.

From the facts, it appears that on the 12th day of August, 1935, the plaintiff and defendant entered into a partnership agreement.

In this agreement, it is recited that between the plaintiff and defendant on August 11, 1935, purchased from and for the latter's interest in the undertaking business conducted under the name of defendant a certain

located at 1111 Cottage Grove Avenue, Chicago, Illinois; (the said

business prior to said August 11th, having been owned jointly by the

said father and the said (son) and the interest therein of said

interest of the said (son) and the (father) of the said (son) as the

first part of the interest of the said (son) was in the defendant's name-

taking business was made by the plaintiff on behalf of the defendant,

anywhere; that the defendant ordered and paid for the said (son) as

the plaintiff, together; and it was the intention of said parties to

carry on the undertaking business and for that purpose to form a partnership;

and, it was, therefore, agreed by and between the plaintiff and

defendant that the said purchase of the plaintiff, of the said interest

of said (son), was made for and on behalf of the defendant, together, and

that the cash amount of \$200.00 was advanced by plaintiff, the defendant

further provided that

"both parties all agree that the said business was in evidence

said partnership will make into a partnership agreement terminating

said business."

and further that the second party (son) and defendant agree that

his interest in one-half of the business is subject to the said (son)

of father for the sum of \$200.00, said (son) and defendant, together, by father,

and father agree to execute a note in favor of the said (son)

of \$750.00 due one year after date.

From the evidence it appears that the business was carried on by plaintiff, although Snyder claims that he actually washed bodies and acted as a funeral director and undertaker. Statements were rendered to Snyder by Thatcher. No further or other partnership agreement was ever entered into between the parties nor was the remaining \$750.00 paid to plaintiff by defendant. Plaintiff possessed a certificate of registration as a funeral director and embalmer and was qualified as an undertaker. It is admitted that Snyder was and had been in the livery business for thirty years, has never possessed at any time a certificate of registration as a funeral director or undertaker at any time, and was never at any time engaged in the undertaking business.

Of the \$750.00 which the defendant placed with the plaintiff as a part payment for a half interest in the business he has received substantially \$705.00 from the business as profits and the plaintiff tendered the remaining \$45 or \$50 to defendant, which defendant refused. Plaintiff claims that the defendant had not and could not qualify as a funeral director and undertaker, and he therefore declined and refused the defendant any right to participate in the carrying on of the business, as well as sharing the profits of said business. The facts are also that the depository bank declined and refused to pay checks signed by plaintiff, and that plaintiff filed his complaint in the lower court praying for an injunction restraining Snyder from interfering in the operation of the said business and restraining the bank from refusing to pay checks issued by him. Thereupon, a temporary injunction was ordered as prayed for in the complaint. An amended complaint was filed alleging that the defendant had no certificate of registration as an undertaker and was therefore prohibited by statute from doing such business and that his participating in the same would jeopardize plaintiff's engagement in said business although plaintiff was legally qualified, the amended complaint praying for substantially the same relief as was prayed for in the original complaint. The defendant prayed for affirmative

relief in his counterclaim, which alleged the existence of a partnership, among other things, and prayed for an accounting, the appointment of a receiver and other relief.

It appears from the contentions of the parties that the cause was heard before the court without a jury, and that proof was offered and introduced on both sides. There was some conflict in the evidence, but it is conceded by both parties that plaintiff's Exhibit 1, the contract in question, was executed by both parties and that no other agreement was executed between the parties. As before indicated, the court entered a decree finding, among other things, that a partnership existed between the plaintiff and defendant, in the undertaking business, known as Barbour and Gustin, located at 4141 Cottage Grove Avenue, Chicago, Illinois; that the allegations of the counterclaim filed by the defendant were substantially true, and that he is entitled to the relief prayed for; that the parties became partners in said business on the 22nd day of August, 1939, on which date a written agreement - - as set forth in the proceedings - - was entered into; that by the terms of such agreement the parties were to share equally from the profits accruing from the operation of said business; and that it is for the interest of both parties that the partnership be dissolved and an accounting had.

The decree that was entered by the court then orders that the temporary injunction theretofore entered, restraining and enjoining the defendant from entering the place of business and restraining the Drexel State Bank from refusing to pay out or honor any checks issued by said plaintiff, be dissolved, vacated and set aside. The cause was then referred to a Master in Chancery to take an accounting of the partnership dealings between plaintiff and defendant. The parties were ordered to produce before the Master all checks, papers and writings in their custody or under their control relating to the undertaking business known and operating under the name of Barbour & Gustin; said parties to be examined upon oath and interrogatories as the Master should direct. The decree goes on further to direct that what is found to be due from

relief in his counterclaim, which alleged the existence of a partnership among other things, and prayed for an accounting, and appointment of a receiver and other relief.

It appears from the consideration of the pleadings that the cause was heard before the court without a jury, and that judgment was offered and introduced on both sides. There was some difficulty in the evidence, but it is conceded by both parties that plaintiff's exhibits in the contract in question, was executed by both parties and that no other agreement was executed between the parties. It further appears, that court entered a decree finding, among other things, that a partnership existed between the plaintiff and defendant, in the contracting business, known as Borden and Weston, located at 4111 Lawrence Avenue, Chicago, Illinois; that the allegations of the counterclaim filed by the defendant were substantially true, and that he is entitled to the relief prayed for; that the parties became partners in said business on the third day of August, 1911, on which date a written agreement was set forth in the proceedings - - - was entered into; that by the terms of such agreement the parties were to share equally from the profits arising from the operation of said business; and that it is for the interest of both parties that the partnership be dissolved and an accounting had. The decree was entered by the court and reads that the temporary injunction theretofore entered, restraining and enjoining the defendant from entering the line of business and restricting the exercise of the right from refusing to pay out of pocket any debts incurred by said plaintiff, be dissolved, vacated and set aside. The court was then referred to a Master in Chancery to take an accounting of the partnership between plaintiff and defendant. The parties were ordered to produce before the Master all books, papers and writings in their custody or under their control relating to the contracting business shown and existing under the name of Borden & Weston; said parties to be examined upon oath and interrogatories as the Master should direct. The decree goes on further to direct that all books to be used from

either party on the balance of said account be paid by such party to the other, within twenty days after the report of the Master shall have been approved and confirmed by the court; and that in the event any sum found due to any party shall not be paid within twenty days that the said partnership business, together with all of its assets including the name and good will, shall be sold under the order and direction of the Court to the highest and best bidder. The decree further appoints a receiver to receive the outstanding debts and effects of the partnership, and the plaintiff ordered to deliver to the receiver all books of accounts, securities, evidences of indebtedness, effects and assets belonging to said business.

The court in the decree further entered a money judgment in favor of defendant as damages against the plaintiff, because of the issuance of the temporary injunction, and ordered that execution issue therefor against plaintiff. It is from this decree that the plaintiff and counter-defendant appeals, as we have indicated in this opinion.

The practice of funeral directing or conducting, or of holding out oneself as conducting or engaged in funeral directing, is provided for under our Public Health statute, Ill. Rev. Stats. 1939, Ch. 111-1/2, Art. 1. Licensing of Funeral Directors, as follows:

"73.2 Practice of Funeral Directing; Sec. 2. Conducting or engaging in or representing or holding out oneself as conducting or engaged in any one or any combination of the following practices, constitutes the practice of funeral directing;

(a) The business of preparing, otherwise than by embalming, for the burial or disposal and directing and supervising the burial or disposal of dead human bodies.

(b) The business of providing or maintaining a place for preparing for the disposition of dead human bodies or for caring for dead human bodies prior to their disposition.

(c) Using in connection with his name or business, the word 'funeral director,' 'undertaker,' 'mortician,' 'funeral home,' 'funeral parlor,' 'funeral chapel,' or any other title implying that he is engaged in the business herein described."

"73.3 License Required to Practice Funeral Directing.
Sec. 3. After the first day of January, 1936, it shall be unlawful for any person to practice or to attempt to practice funeral directing without a certificate of registration as a registered funeral director, issued by the Department. Nor shall any person practice funeral directing who does not have a fixed place of business or establishment devoted

either party to the action of this court be held to be such party as the other, within twenty days after the report of the referee shall have been approved and certified by the court; and that in the event the court find due to any party shall not be held liable for any loss or damage sustained by the other party, together with all of the costs and expenses of the action and good will, shall be held under the order and judgment of the court to the highest and best order. The referee further appoints a receiver to receive the outstanding debts and claims of the plaintiff, and the plaintiff agrees to deliver to the receiver all books of accounts, receipts, evidence of indebtedness, contracts and notes belonging to said business.

The court in the order further ordered a writ of injunction in favor of defendant as hereinafter stated. The plaintiff, because of the issuance of the temporary injunction, and ordered that execution issue therefor against plaintiff. It is found that plaintiff has not complied with the order of the court, and as such plaintiff is in violation of the order. The practice of funeral directing or embalming, or of holding out oneself as conducting or engaged in funeral directing, is provided for under our public health statute, Ill. Rev. Stat., 1907, Ch. 111-1/2, Art. I. Section of Public Health Statute, as follows:

"73.2 Practice of funeral directing; no person shall engage in or representing or holding out himself as conducting or engaged in any one or any combination of the following business, nor-attends the practice of funeral directing:

(a) The business of preparing, embalming, or otherwise treating the body of a deceased person and directing and supervising the burial or disposal of dead human bodies.

(b) The business of providing or maintaining a place for preparation for the disposition of dead human bodies or for setting out dead human bodies prior to their disposition.

(c) Using in connection with his name or business, the word 'funeral director', 'embalmer', 'monumental', 'funeral home', 'funeral parlour', 'funeral chapel', or any other title implying that he is engaged in the business herein described."

73.3 License required in practice funeral directing.
Sec. 3. After the first day of January, 1912, it shall be unlawful for any person to practice or to attempt to practice funeral directing without a certificate of registration as a registered funeral director issued by the Department. The said person shall receive funeral direct- ing and shall not have a third class of business or establishment created

to the care and preparation for burial or for transportation of dead human bodies, or who is not regularly employed in such a place of business or establishment."

"73.8 Renewal-Restoration-Practice by Corporation, Partnership, etc.

Sec. 8. * * * No corporation, partnership, firm or association of individuals, as such, shall be issued a certificate of registration as a registered funeral director, nor shall any corporation, partnership, firm or association of individuals, or any individual connected therewith, publicly advertise such corporation, partnership, firm or association of individuals as being registered funeral directors or as being engaged in the practice of funeral directing; provided, however, that any person of good moral character and temperate habits who was engaged in the practice of funeral directing on July 1, 1935, as an owner, member or employee of a corporation, partnership, association or firm, or any corporation, partnership, firm or association so engaged, shall be permitted to continue to engage in the practice of funeral directing and to publicly advertise as being so engaged, if the said owner, member or employee shall have complied with all other provisions of this Act."

"73.10 Refusal to Issue or Renew-Suspension or Revocation of Certificate.

Sec. 10. The Department may either refuse to issue or may refuse to renew or may suspend or may revoke any certificate of registration for any one or any combination of the following causes:

- (a) The obtaining of or any attempt to obtain a certificate of registration by fraudulent misrepresentation.
- (b) Conviction of a felony as shown by a certified copy of the record of the court of conviction.
- (c) Violation of the laws of this State relating to the burial or disposal of dead human bodies or of the rules and regulations of the Department, or the Department of Public Health.
- (d) For conclusive proof that the funeral director has directly or indirectly paid or caused to be paid any sum of money or other valuable consideration for the securing of business or obtaining authority to dispose of any dead human body.
- (e) For incompetency or untrustworthiness in the practice of funeral directing.
- (f) Upon satisfactory proof that the funeral director has employed someone not legally registered or licensed in any position or for any work for which a certificate of registration of license is herein required."

The same act, by its terms, provides penalties for violations of any of its provisions, and from this section which is paragraph 73.27, sec. 7, it is provided as follows;

"73.27 Penalties for Violations.

Sec. 7. Each of the following acts is a misdemeanor punishable upon conviction by a fine of not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200.00) or by imprisonment in the county jail for not less than ten (10) days nor more than three (3) months or by both such fine and imprisonment;

(a) The practice of funeral directing or of embalming or an attempt to practice funeral directing or embalming without a certificate of registration as a registered funeral director or a registered embalmer respectively " * * *."

There are other provisions in the act which provide penalties for other acts, such as (b) service as an apprentice under a registered embalmer or an attempt to serve as an apprentice under a registered embalmer without a certificate of registration as an apprentice; (c) the obtaining of or the attempting to obtain a certificate of registration, or business, or any other thing of value by fraudulent representations; (d) permitting any person in one's employ, or under one's service to serve as a funeral director, or as an embalmer, or as an apprentice under a registered embalmer unless that person has a certificate of registration as a registered funeral director, or as a registered embalmer, or as a registered apprentice, as the case may be; and (e) the failure to display the certificate of registration as required in section 7 of Article 1 and section 7 of Article 2 of this act.

The defendant and cross-plaintiff, Oscar Snyder, at the conclusion of his brief, contends by his attorneys that there was a partnership between plaintiff and defendant, and submits that under the authorities and the evidence the agreement upon which the partnership is predicated is absolute and unconditional. The plaintiff suggests that while there was an agreement entered into between the parties, there was to be a further partnership agreement entered into which would have been final. However, from an examination of the evidence in this record, it is apparent that plaintiff and defendant were engaged in the business as funeral directors, and this is established by the plaintiff's quotation from the testimony of the defendant, which is as follows;

"From August 11th to the present time I only helped wash the bodies, I did not do it alone - - Mr. Thatcher was always there - - I rubbed the body with a sponge - - took off the clothes and later on dressed the body and put it in the casket and moved it into the chapel - - I did this about twenty times, or helped twenty times, from the middle of August until the middle of February - - I do not know just when was the last time - - suppose it was after the meeting in Turner's office."

And the evidence further established that the defendant was busily engaged, during the time that he was in business with Mr. Thatcher, in preparing bodies for burial. There is no question that he was engaged in conducting "the business of preparing, otherwise than by embalming, for the burial and disposal and directing and supervising the burial or disposal of dead human bodies" (the quotation being from the statute which we have incorporated in this opinion).

When we come to consider the provisions of this particular statute, we find that the business operated by the parties was one "of providing or maintaining a place for preparing for the disposition of dead human bodies or for caring for dead human bodies prior to their disposition."

It would seem from what we have quoted here, that the defendant Snyder was a partner and as a partner received during the time he was so engaged, the sum of \$705.00, as a part or share of the profits that were made by the enterprise that they were engaged in. The amount invested in cash was \$750.00 and it seems from the briefs that the plaintiff tendered \$45.00, which would have made the \$750.00, which was invested by defendant in cash. The business was conducted by the parties in this litigation and Thatcher was a registered funeral director, but Snyder was not.

As we look at the situation, it was a transaction that did not comply with the Public Health statute which we have incorporated in this opinion, which statute provides for the licensing of funeral directors. Such being the case, it does not seem that the court was justified in finding and entering a decree for the defendant and cross-plaintiff, Oscar Snyder. The transaction was in violation of the Act that controlled the operation of the business that the parties were engaged in. The defendant Snyder relies on the fact that the original firm that was in the embalming business under the name of Barbour & Gustin was engaged in the practice of funeral directing long prior to July 1, 1935, and that, Thatcher having been engaged in that business under the name of that firm, when the agreement was entered

and the evidence further established that the defendant was directly engaged, during the time that he was in possession of the body, in preparing bodies for burial. There is no question that he was engaged in conducting the business of embalming, preparing and disposing of dead human bodies for the burial and disposal of dead human bodies. (The defendant being from the statute which we have introduced is still a dealer.)

When we come to consider the provisions of this section of our statute, we find that the business provided by the statute and one of providing or maintaining a place for receiving the bodies of dead human bodies or for a place for their disposal is prohibited to their disposal.

It would seem from what we have stated here, that the defendant Snyder was a partner and as a partner received during the time he was so engaged, the sum of \$200.00, as a part of which the profits that were made by the defendant and his partner were shared in. The amount invested in each was \$100.00. It seems from the record that the plaintiff furnished \$200.00, which would have made the \$400.00 which was invested by defendant in each. The business was conducted by the parties in this fashion and Snyder was a partner.

General director, but Snyder was not.

As we look at the situation, it was a partnership that did not comply with the Public Health statute which we have introduced in this opinion, which statute provides for the licensing of funeral directors. Such being the case, it seems that the fact that the parties were engaged in this business and receiving a share for the services and profits in this business, the partnership was in violation of the act that controlled the operation of the business and the parties were engaged in. The defendant Snyder acted as the fact that the original firm that was in the business was Snyder and his partner.

Snyder & Snyder was engaged in the operation of funeral directing from 1912 to July 1, 1913, and then Snyder acting alone was engaged in business under the name of that firm, when the partnership was engaged

into between the plaintiff Thatcher and defendant Snyder the original business was merely continued. The defendant contends that because of the firm under which they were doing business, both of the men originally with Barbour & Gustin having long since died, that they are continuing the business and that, in fact, he (Snyder) was not expected under the Statute to become a licensed undertaker. We are unable to agree with this view for the reason that the formation of a partnership to succeed an old long established firm engaged in the practice of funeral directing does not continue that firm, and that any person who enters into an agreement with a former partner cannot continue in that business unless complying with the statute in question.

As we have already stated in this opinion, Snyder, the defendant, entered into this agreement long after the partnership had been dissolved by the death of the partners. Under the statute that we have before us, the defendant is not allowed to continue to practice as a funeral director unless he received a license to practice such funeral directing. The statute on this question, being Illinois Revised Statutes, 1939, Ch. 111-1/2, sec. 73.8, uses this language;

" * * * Provided, however, that any person of good moral character and temperate habits who was engaged in the practice of funeral directing on July 1, 1935, as an owner, member or employee of a corporation, partnership, association or firm, or any corporation, partnership, firm or association so engaged, shall be permitted to continue to engage in the practice of funeral directing and to publicly advertise as being so engaged, if the said owner, member or employee shall have complied with all other provisions of this act."

As the facts appear in this record, the defendant Snyder was not engaged in the firm at the time the act went into effect on the first day of July, 1935.

There is, however, a question that we must consider, and that is that the contract, under which defendant seeks to recover, is an illegal one.

The plaintiff in this action contends that the Court should have left the parties where it found them and declined to grant any relief for the reason that the agreement is invalid and unenforceable, that the agreement herein was illegal, and that under the circumstances

into between the plaintiff and defendant when the original business was orally assumed, the defendant intended that business of the firm under which they were then operating, both of the same originally with defendant & plaintiff having been since then, and continuing the business and after, in 1907, the defendant was and continued under the statute to become a licensed undertaker, he was unable to agree with this view but the reason that the location of a partnership to proceed in old long established firm was in the opinion of the mutual directing does not continue in a firm, and that the business was entered into an agreement with a former partner cannot continue in that business unless operating with the defendant in connection.

As we have already stated in this opinion, namely, the defendant, entered into this partnership with the plaintiff and been dissolved by the death of the plaintiff. Under the statute that may be before us, the defendant is not allowed to continue in partnership as a financial director unless he receives a license in connection with financial directing. The statute on this matter, being Illinois, which is as follows: 1903, Ch. 111-1/2, sec. 77.8, now this language:

"... provided, however, that any person who had been a partner in a partnership who was engaged in the practice of financial directing on July 1, 1903, as an owner, partner or employee of a partnership, partnership, association or firm, or any other firm, partnership, firm or association as a partner, shall be entitled to continue in the practice of financial directing and to continue in connection with the same, if the said owner, partner or employee shall have complied with all other provisions of this act."

As the facts appear in this record, the defendant, having been a partner in the firm at the time the act was first passed on the 1st day of July, 1903.

There is, however, a provision that is now contained in the statute that is that the contract, which which defendant made in 1907, is an illegal one.

The plaintiff in this action demands that the court should have left the parties where it found them and declined to grant any relief for the reason that the agreement is illegal and voidable, that the agreement between the parties is illegal, and that under the circumstances

no relief can be granted. It is suggested that this contention is based upon public policy and is not intended to punish or benefit any party to such an agreement. Upon the questions that were called to our attention, the case of Klein v. Chicago Title & Trust Co., 295 Ill. App. 208, is cited, where the court said;

"In Schaffner v. Pinchback, 133 Ill. 410, the court held that where persons engaged in an unlawful business so that they are in pari delicto the law will not assist either one, but will leave them where they have placed themselves. In Miller v. Davidson, 3 Oilm. (Ill.) 518, the court said (pp. 524, 525): 'No principle is better settled, than that where two or more persons embark in an unlawful transaction, and one gets the advantage of the others, and appropriates more than his proportion of the spoils to himself, the Court will not interfere to make him divide with the others. As they commenced with a violation of the law, they cannot invoke its aid in any way. The law will not meddle with gains obtained by its own outrage, as between those who have been engaged intrampling it under foot.' "

From the authorities cited to this court, the rule is that where parties to an illegal contract are in pari delicto, no affirmative relief will be given to one against the other. In the case of Vock v. Vock, 365 Ill. 432, the court said;

" * * * The law is that where the parties are in pari delicto no affirmative relief of any kind will be given to one against the other. The only equitable remedy which they can obtain is such as is purely defensive. If a contract is illegal, affirmative relief against it will not be granted unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. When the parties are in pari delicto and the contract has been executed on the part of one of them by the conveyance of property or the payment of money, neither party can recover anything paid under the contract. (citing cases)" * * * The parties, being in pari delicto, defendant is not entitled to a conveyance of the property purchased by plaintiff out of the money paid to her under the contract."

When we take into consideration the contract here in question and, as we have already indicated, the fact that the defendant was not a licensed embalmer or undertaker, the defendant (and counter-plaintiff) is not entitled to the relief that was prayed for, and granted by the Court in the decree that was entered, for the reasons as we have stated that defendant did not comply with the statutory provisions of the public health law that we have cited - Ill. Rev. Stat.

no relief can be granted. It is suggested that some consideration be
based upon public policy and is not necessary to require an affidavit of
party to such an agreement. Upon the question when relief is
our attention, the case of Field v. American Life Ins. Co., 111
107, 208, is cited, where the court said:

"In Field v. American Life Ins. Co., 111, 112, the court said
that there persons engaged in the business of insurance who have been
in part defrauded by the law all have suffered with loss, but will have some
there have been some losses. In Field v. American Life Ins. Co., 111, 112, the court said (111, 112, 113): 'The principle is well
settled, that there are no more persons who are in an insured
transaction, and who have the same rights as the others, and as to the
does more than his proportion of the losses to himself, the court
will not interfere to make his division with the others. It may
conceded with a violation of the law, but a court cannot do so in
any way. The law will not make him liable to the others in order
outlets, as between those who have been wronged and those who have
lost.'"

from the authorities cited as being correct, the rule is that relief
to an insured contract is in Field v. American Life Ins. Co., 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

" * * * The law is that where the parties are in Field v. American Life Ins. Co., 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

then as the law, considering the contract was in
question and, as we have already said, the fact that the contract
was not a licensed contract of insurance, the statement that contract
plaintiff is not entitled to the relief that was prayed for, and
granted by the Court in the cases that we reviewed, for the reasons
as we have stated in our statement and our reply with the statement
provisions of the public policy law that we have given - 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 6

1939, Ch. 111-1/2, Art. 1. It is admitted that he is not a licensed embalmer or funeral director, and the evidence seems to be conclusive that he performed services in the embalming parlor, wherein he prepared the bodies that were in the business place at the various times, and that he rendered such services as were necessary to the proper disposition of the bodies which was in violation of the statute.

Therefore, from what we have said in this opinion, the decree entered by the court for the defendant and counter-plaintiff is reversed, and the suit dismissed.

DECREE REVERSED AND SUIT DISMISSED.

BURKE AND DENIS E. SULLIVAN, JJ. CONCUR.

1933, Ch. 111-1/2, Sec. 1. It is admitted that he is not a licensed embalmer or funeral director, and the evidence seems to be conclusive that he performed services in the embalming matter, whether he was paid the bodies that were in the business place at the various times, and that he rendered such services as were necessary to the proper disposition of the bodies which was in violation of the statute. Therefore, from what we have said in this opinion, the bodies entered by the statute are the bodies and containers which are reversed, and the only thing.

CHURCH, WITNESS AND HIS OFFICERS.

MURKIN AND DENNIS A. MILLER, JR. COUNSEL.

1190

In the Matter of the Estate of NAOMA HARTFORD
ASHBECK, deceased,

On Appeal of WILLIAM S. HARTFORD, Conservator
for Hattie S. Hartford, an incompetent person,

APPEAL FROM

CIRCUIT COURT

Appellant,

COOK COUNTY.

WILLIAM L. ASHBECK, Executor of the Estate of
Naoma Hartford Ashbeck, Deceased, and VIOLA
J. ASHBECK,

Appellees.

308 I.A. 326

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Dr. William P. Hartford, a physician and surgeon, and his wife, Hattie S. Hartford, lived at Champaign, Illinois. The husband, Dr. William P. Hartford, died on June 7, 1933. Hattie continued to reside at Champaign. A son, Dr. William S. Hartford also a physician and surgeon, resides at Champaign. Naoma Hartford, a daughter of Dr. William P. Hartford and Hattie S. Hartford, and a sister of Dr. William S. Hartford, married William L. Ashbeck in April, 1917. William L. Ashbeck became acquainted with Hattie in 1913 in Champaign, while he was courting the daughter, Naoma. After the marriage, the Ashbecks moved to Chicago, and were blessed with the birth of a daughter, Lois Jean. The daughter is now 16 years of age. Viola J. Ashbeck is a sister of William L. Ashbeck and an aunt of Lois Jean. Naoma made her will at Chicago on April 17, 1931. She died in that city on May 2, 1931. On June 19, 1931, the will of Naoma was admitted to probate in the Probate Court of Cook County and on the same day letters testamentary were issued, appointing William L. Ashbeck, the widower, as executor. On June 14, 1932, an inventory of Naoma's estate was filed and approved. The estate has not been closed.

On June 11, 1938, Dr. William S. Hartford of Champaign, filed a petition in the County Court of Champaign County. This petition alleged that his mother, Hattie, was afflicted with bodily infirmities, which rendered her incompetent to manage her estate, and prayed that a jury be summoned for the purpose of ascertaining whether Hattie was incompetent, and that if the jury so found, that he be appointed the

3081A.886

On June 12, 1932, Dr. William F. Hartford, a physician and surgeon, and his wife, Hattie E. Hartford, lived at Chicago, Illinois. The daughter of Dr. William F. Hartford, died on June 7, 1932. Hattie continued to reside at Chicago. A son, Dr. William E. Hartford, also a physician and surgeon, resides at Chicago. William E. Hartford, a daughter of Dr. William F. Hartford and Hattie E. Hartford, and a sister of Dr. William E. Hartford, married William E. Ashbeck in April, 1917. William E. Ashbeck became acquainted with Hattie in 1917 in Chicago. While he was courting the daughter, Hattie, after the marriage, the Ashbecks moved to Chicago, and were blessed with the birth of a daughter, Lois Jean. The daughter is now 15 years of age. Hattie Ashbeck is a sister of William E. Ashbeck and an aunt of Lois Jean. Hattie made her will at Chicago on April 17, 1932. She died in that city on May 8, 1931. On June 12, 1931, the will of Hattie was admitted to probate in the Probate Court of Cook County and on the same day Hattie's testamentary were proved, appointing William E. Ashbeck, the widow, as executor. On June 12, 1932, an inventory of Hattie's estate as filed and approved. The estate has not been closed. On June 12, 1932, Dr. William F. Hartford of Chicago, filed a petition in the County Court of Cook County, Illinois. This petition alleged that his mother, Hattie, was afflicted with mental infirmity, which rendered her incompetent to manage her estate, and prayed that she be removed for the purpose of ascertaining whether Hattie was incompetent, and that if the jury so found, that she be appointed a

conservator of Hattie's person and estate. The jury was impaneled and found that she was "physically incapacitated, and in consequence of such physical incapacity, is not capable of taking care of her property and effects." The verdict was received and on June 20, 1938, the court appointed William S. Hartford conservator of her person and property.

In July, 1938, Dr. William S. Hartford filed his petition in the Probate Court of Cook County, entitled, In the Matter of the Estate of Naoma Hartford Ashbeck, deceased, and stated that he had been appointed conservator of and for Hattie S. Hartford, an incompetent person and that the second paragraph of the will of Naoma read:

"Second: I give and bequeath unto my beloved daughter, Lois Jean Ashbeck, my engagement ring, bow-knot platinum diamond pin, Zircon ring, and all of the jewelry I have acquired from my mother, Hattie S. Hartford, consisting of two diamond earrings of one and one-half carats each, diamond solitaire ring of slightly more than one and one-half carats, and one Gephardt diamond cluster ring of seven diamonds. (The jewelry acquired from my mother was given to me for more than Four Thousand Dollars (\$4,000.00) which I have advanced to my mother and father for their support since February, 1927.) My mother has possession of this jewelry now because I have been permitting her to wear it until I should want it. All the jewelry which I am leaving to my daughter, I desire to be held in trust by my sister-in-law, Viola J. Ashbeck, for my daughter, Lois Jean, with permission to said Viola J. Ashbeck to wear said jewelry, or any of it if she should so desire. It is my suggestion that my engagement ring be turned over to my daughter on her eighteenth birthday, and the remaining jewelry to be given to her when she shall become twenty-one years of age."

He further alleged that the jewelry which the second paragraph of the will mentioned as having been acquired from Naoma's mother, had been in turn acquired by Hattie from her husband, then deceased; that at no time did Hattie make a gift of any portion of the jewelry to Naoma or any other person; that at the time of the making of Naoma's will the jewelry was in the possession of Hattie and was the latter's sole and exclusive property; that at the time of the death of Naoma and at the time of the issuance of letters testamentary, the jewelry was in the possession of Hattie and was her sole and exclusive property; that during the month of July, 1931, William L. Ashbeck and his sister, Viola, visited Hattie at the latter's home in Champaign, and by diverse fraudulent misstatements succeeded in obtaining possession of the jewelry; that it was at no time the intention of Hattie to make a gift of any part of the jewelry to any person; that Hattie delivered temporary

conservator of Hattie's person and estate. The jury was instructed and found that she was "physically incapacitated, and in consequence of such physical incapacity, is not capable of taking care of her property and effects." The verdict was received and on June 22, 1906, the court appointed William L. Hartford conservator of her person and property. In July, 1908, Mr. William L. Hartford filed his petition in the Probate Court of Cook County, Illinois, in the matter of the estate of John Hartford Ashbrook, deceased, and stated that he had been appointed conservator of and for Hattie L. Hartford, an incompetent person and that the second paragraph of the will of John read:

"second: I give and bequeath unto my beloved daughter, Hattie L. Hartford, my diamond ring, set with a diamond of about fifteen carats weight, and all of the jewelry I have acquired from my mother, consisting of two diamond earrings of one and one-half carats each, diamond collar ring of about one-half carat, and one diamond bracelet of about one-half carat, and one diamond ring of about one-half carat, which I have given to my mother and father for their support since January, 1907. My mother has possession of this jewelry now because I have been residing with her to wear it until I should want it. All the jewelry which I am leaving to my daughter, I desire to be held in trust by my sister-in-law, Viola J. Ashbrook, for my daughter, Hattie L. Hartford, until she should be of age. It is my intention that my daughter should wear the jewelry to be given to her when she shall become twenty-one years of age."

He further alleged that the jewelry which the second paragraph of the will mentioned as having been acquired from John's mother, and being in turn acquired by Hattie from her husband, then deceased; that at no time did Hattie make a gift of any portion of the jewelry to whom or any other person; that at the time of the making of John's will the jewelry was in the possession of Hattie and was her sole and exclusive property; that at the time of the death of John and at the time of the making of Hattie's testamentary, the jewelry was in the possession of Hattie and was her sole and exclusive property; that during the month of July, 1907, William L. Hartford and his sister, Viola, visited Hattie at the latter's home in Chicago, and by their fraudulent misstatements succeeded in obtaining possession of the jewelry; that it was at no time the intention of Hattie to make a gift of any part of the jewelry to any person; that Hattie delivered temporary

possession of the jewelry to the Ashbecks only with the "mistaken idea that it was necessary to surrender said jewelry to them in order to safeguard the same;" that thereafter, and particularly during October, 1937, Hattie demanded the return of the jewelry; that the statement in the will of Naoma that she, Naoma, was then the owner of the jewelry, was untrue, or was made by mistake. The petition asked for the return of the jewelry. William and Viola Ashbeck answered that the facts with reference to the ownership and possession of the jewelry were as set out in the second paragraph of the will; that Hattie made a gift of the jewelry to Naoma and that Hattie was permitted to wear the jewelry until Naoma should want the same. On January 27, 1939, the Probate Court of Cook County entered an order disposing of the various controversies presented by the petition of William S. Hartford. The court found that the respondents, William and Viola Ashbeck then had in their possession 2 diamond earrings of 1-1/2 carats each and 1 diamond solitaire ring of slightly more than 1-1/2 carats; that the jewelry was the property of Hattie S. Hartford, an incompetent person, and directed that the respondents forthwith deliver the jewelry to William S. Hartford, as her conservator. An appeal was perfected to the Circuit Court of Cook County, where the case was tried de novo. While the case was on trial, the court became convinced that in order to safeguard the interests of the minor, Lois Jean, a guardian ad litem should be appointed, which was accordingly done. The guardian ad litem filed an answer which denied that the petitioner was entitled to any of the relief prayed; asserted that the claim set out in the petition was barred by the Statute of Limitations and that he had no information sufficient to form a belief as to any of the allegations of the petition, and put the minor "upon the tender consideration of the court". The court found the issues against the petitioner and denied the prayer of his petition. This appeal followed.

Petitioner's theory is that the burden of proof is on respondents to establish a gift inter vivos from Hattie to Naoma; that there is no proof of such gift; no proof of delivery of the jewelry to the alleged

[illegible]

donee and no proof of intent to make a gift by the alleged donor; that the issue of a gift to the minor, Lois Jean, was not before the Probate or the Circuit Court, and that in any event there is insufficient proof of the gift to the minor, Lois Jean. The theory of respondents is that a gift by Hattie to Naoma was sufficiently established by the evidence; that the issue of a gift to the minor was properly before the Circuit Court; that the petitioner must recover on the strength of Hattie's title; that petitioner's claimed that Hattie had previously sold the jewelry and therefore does not have title to the jewelry; that petitioner cannot recover because the evidence clearly shows a gift to the minor and that the claim for the return of the jewelry is barred by the Statute of Limitations.

The first point presented by the conservator is that respondents failed to prove that the jewelry was the subject of a gift inter vivos from Hattie to Naoma. We agree with his statement that it is necessary in sustaining a gift inter vivos to prove (1) an intention by the donor presently and irrevocably to transfer ownership of the article to the donee, and (2) delivery to the donee which is present, absolute and irrevocable. Counsel call attention to the distinction between a gift inter vivos and a gift causa mortis. Respondents are relying on a gift inter vivos and not on a gift causa mortis. Appellees do not challenge the statement of the law as announced by appellant. We are called upon, therefore, to decide whether the evidence sustains the finding of the court. To better understand the testimony of the witnesses, we have read the transcript.

We find that a close bond of love and affection existed between Naoma, her husband and her parents, Dr. William P. Hartford and Hattie S. Hartford; that the Ashbecks had expended considerable sums of money for the support of Dr. William P. Hartford and his wife Hattie; that three or four times a year the Ashbecks visited the Hartfords in Champaign and about the same number of times the Hartfords visited the Ashbecks in Chicago. There is competent testimony which warranted the trial court in deciding that Hattie made a valid gift of the jewelry to

one and no proof of intent to make a gift by the alleged donor; and the issue of a gift to the minor, Kate Jean, was not before the court. The difficult point, and that in my opinion there is insufficient proof of the gift to the minor, Kate Jean. The theory of respondents is that gift by Hattie to Naomi was sufficiently established by the evidence; and that the issue of a gift to the minor was properly before the court.

That the petitioner must recover on the strength of Hattie's gift; that petitioner's claim that Hattie had previously sold the jewelry and therefore does not have title to the jewelry; that petitioner cannot recover because the evidence clearly shows a gift to the minor; and that the claim for the return of the jewelry is barred by the statute of limitations.

The first point presented by the respondents is that respondents failed to prove that the jewelry was the subject of a gift inter vivos from Hattie to Naomi. We agree with his statement that it is necessary in sustaining a gift inter vivos to prove (1) an intention by the donor presently and irrevocably to transfer ownership of the thing to the donee, and (2) delivery to the donee which is present, absolute and irrevocable. Counsel call attention to the distinction between a gift inter vivos and a gift causa mortis. Respondents are relying on a gift inter vivos and not on a gift causa mortis. Respondents do not dispute the statement of the law as announced by appellate courts. We are called upon, therefore, to decide whether the evidence sustaining the finding of the court. To better understand the testimony of the witnesses, we have read the transcripts.

We find that a close bond of love and affection existed between Naomi, her husband and her mother, Dr. Miller, and that the latter; that the latter had several conversations with the respondent for the support of Dr. Miller and his wife during at three or four times a year. The latter visited the hospital in England and about the same number of times the latter visited the hospital in Chicago. There is competent testimony which sustained the trial court in deciding that Hattie made a valid gift of the jewelry to

Naoma. We agree that the statement in the will, standing alone, is in the nature of a self serving declaration. However, there is testimony that a copy of the will was sent to Hattie shortly after Naoma's death; also that in 1932 Hattie stated that she wanted the jewelry, which Naoma mentioned in her will, to go eventually to her grandchild, Lois Jean. This testimony was believed by the trial judge. In recounting the reasons for his decision, the trial judge stated that at the time the jewelry was turned over to William and Viola Ashbeck in 1932, Hattie knew that Naoma had made a will in which she, Naoma, left the jewelry to Lois Jean. Therefore, the action of Hattie in delivering the jewelry to the respondents should be viewed in the light of the testimony that she then knew the contents of the second paragraph of her daughter's will. After the delivery of the jewelry to the Ashbecks at Champaign in 1932, Hattie did not complain of the possession thereof by the Ashbecks, or take any steps to repossess the same until October, 1937, a period of approximately 5 years. During this period William and Viola Ashbeck continued friendly relations with Hattie, visiting her frequently. The fact that for 5 years Hattie did not object to the possession of the jewelry by the Ashbecks, or take any steps to recover the same, during all of which time the relationship between the parties was friendly, lends additional support to respondent's case. We are of the opinion that the evidence warranted the trial court in finding that there was a valid gift inter vivos from Hattie to Naoma.

Finally, appellant insists that the issue of whether there was a gift from Hattie to Lois Jean, the minor, was not before the court. The record shows that during the pendency of the case in the Probate Court the attention of the judge was called to the fact that the interest of a minor was involved. However, no guardian ad litem was appointed in that court. The trial judge in the Circuit Court appointed a guardian ad litem. In our opinion he acted properly in so doing. From a careful reading of the transcript of the proceedings, we are convinced that the claim that there was a gift from Hattie to Lois Jean was presented to the trial court. The matter was mentioned by the

known. It appears that the statement in the will, reciting above, is in the nature of a self-serving declaration. However, there is testimony that a copy of the will was sent to Louis Jewell after his death; also that in 1932 Justice stated that he wanted the jewelry, which James mentioned in her will, to go eventually to her grandchildren. This testimony was believed by the trial judge. In reviewing the reasons for his decision, the trial judge stated that at the time the jewelry was turned over to William and Viola Johnson in 1932, Justice knew that James had made a will in which she, known, left the jewelry to Louis Jean. Therefore, the action of Justice in delivering the jewelry to the respondents should be viewed in the light of the testimony that she then knew the contents of the second paragraph of her daughter's will. After the delivery of the jewelry to the respondents at Chicago in 1932, Justice did not recede from the possession of the jewelry by the respondents, or take any steps to recover the same until October, 1937, a period of approximately 5 years. During this period William and Viola Johnson continued to reside with Justice, visiting her frequently. The fact that for 5 years Justice did not object to the possession of the jewelry by the respondents, or take any steps to recover the same, during all of which time the relationship between the parties was friendly, lends additional support to respondent's case. He is of the opinion that the evidence warranted the trial court in finding that there was a valid gift from Justice to Louis Jean. Finally, appellant insists that the issue of whether there was a gift from Justice to Louis Jean, the minor, was not before the court. The record shows that during the pendency of the case in the Probate Court the action of the judge was called to the fact that the instrument of a minor was involved. However, no finding of fact was appointed in that court. The trial judge in the circuit court appointed a guardian of the person. In our opinion he acted properly in so doing. From a careful reading of the transcript of the proceedings, we are convinced that the trial court found as a fact that Justice intended

guardian ad litem and by the trial judge and was discussed by the attorneys. Appellant cannot now be heard to say that the claim that there was a gift from Hattie to the minor was not presented to the Circuit Court. However, as Naoma's will bequeathed the jewelry to her daughter, Lois Jean, it is unnecessary to determine whether there was a valid gift inter vivos from Hattie to Lois Jean. At the time of the delivery of the jewelry to William and Viola Ashbeek in 1932, Hattie clearly recognized the rights of Lois Jean as expressed in Naoma's will.

The trial judge saw and heard the witnesses and had an opportunity to observe their demeanor. In a case tried before the court without a jury the findings of the court upon the evidence are conclusive of the facts, unless there is error of law in the proceedings or unless the findings are so manifestly against the weight and preponderance of the evidence that the reviewing court may say it is the result of passion, prejudice or mistake. We have read the exhibits and the transcript of the testimony, and have considered the case in the light of all the circumstances presented by the record, and are convinced that the judgment of the court is in accordance with justice. Therefore, the order of the Circuit Court of Cook County of December 29, 1939, is affirmed.

ORDER AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

1. The first of these is the fact that the trial judge, in his opinion, was not bound to accept the evidence of the witnesses who testified that the defendant had been in the car at the time of the shooting.

As a gift from Mattie to the minor was not presented to the District Court. However, as Moore's will bequeathed the jewelry to her daughter, the Court, it is necessary to determine whether there was a valid gift after giving from Mattie to John. At the time of the delivery of the jewelry to William and Viola Lebeck in 1932, Mattie directly transferred the rights of her claim as expressed in Moore's will.

The trial judge has and having the witness and had an opportunity to observe their demeanor, in a case where before the court without a jury the findings of the court upon the evidence are conclusive of the facts, unless there is error of law in the proceedings or unless the findings are manifestly against the weight and understanding of the evidence that the reviewing court may say it is the result of prejudice or mistake. We have read the exhibits and the transcript of testimony, and have considered the case in the light of all the circumstances presented by the record, and are convinced that the judgment of the court is in accordance with justice. Therefore, the order of the Circuit Court of Cook County of December 22, 1936, is affirmed.

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RECEIVED, JANUARY 1, 1900

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GEORGE W. WAGNER,

Plaintiff - Appellant,

v.

JOHN D. WICKSTROM, et al., Defendants

CECIL EMERY,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

308 I.A. 326

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 7, 1937, George W. Wagner filed a complaint in the Circuit Court of Cook County and therein alleged that on December 6, 1917, John D. Wickstrom, a bachelor, made, executed and delivered a certain principal promissory note in the sum of \$1,800.00, payable three years after date with interest at 6% per annum, secured by a trust deed of the same date to John A. Schmidt, as trustee, on real estate commonly known as 3229 South Wabash Avenue, Chicago, improved by a three story brick building containing 30 rooms and occupied as a rooming house; that he, plaintiff, is the legal owner and holder of the trust deed; that payment of the principal note was extended from December 6, 1920, to December 6, 1923; that payment was further extended from December 6, 1923, to December 6, 1926; that all interest was paid on the original note under the extension agreements, except an interest coupon in the sum of \$63.00, which fell due on December 6, 1926; that by mesne conveyances the real estate was conveyed to Walter D. Ryan and Marie O. Ryan, as joint tenants; that on October 12, 1929, the Ryans executed a trust deed to the Chicago Title & Trust Company to secure the payment of a principal promissory note in the sum of \$700.00; that Cecil Emery recovered a judgment in the sum of \$63.60 on September 19, 1929, against Walter D. Ryan in the Municipal Court of Chicago, and that the Sheriff of the Municipal Court made a levy on the real estate on May 6, 1936. Plaintiff prayed that the court direct that the amount of the note secured by the trust deed of December 6, 1917, plus interest, sums advanced for insurance and for the continuation of the abstract, attorney's fees and costs be

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for the continuation of the debt, attorney's fees and costs in
trust deed of December 6, 1914, plus interest, were advanced for insurance
policy that the court first that the amount of the note secured by the
mortgage in the sum of \$2,400 on September 12, 1935, against which a
necessary note in the sum of \$2,400; that said note was transferred to
the Chicago Title & Trust Company to secure the payment of a mortgage
point mortgage; that on October 12, 1935, the year advanced a trust deed
the real estate was conveyed to Walter A. Ryan and Gertrude E. Ryan, and
\$2,000, which fell due on December 6, 1935; that by same conveyance
under the extension agreement, except an interest coupon in the sum of
December 6, 1935; that all interest was paid on the original note
December 6, 1935; that payment was further advanced from December 6, 1935,
payment of the original note was extended from December 6, 1935, to
not be, finally, in the last order and notice of the trust deed; that
rick building containing 30 rooms and comprises in a rooming house;
down as 3033 North LaSalle Avenue, Chicago, Illinois, by a third party
of the same date to John A. Bonfield, as trustee, on said notes commonly
were after date with interest at 5% per annum, secured by a trust deed
ert in principal promissory note in the sum of \$2,400, payable three
317, John A. Bonfield, as trustee, made, executed and delivered a
the Circuit Court of Cook County and therein stated that on December 6,
On June 7, 1937, George A. Ryan filed a complaint in
for the continuation of the debt, attorney's fees and costs in

paid within a short day; that in default of such payment the premises be sold to satisfy such indebtedness, and that after sale, in case the premises are not redeemed, the defendants be forever barred from redemption and that plaintiff also have judgment for any deficiency. Defendant Emery filed an answer which denied that plaintiff was the owner of the note representing the indebtedness secured by the trust deed sought to be foreclosed, and further denied that the interest of defendant Emery was subject to the lien of the trust deed. The answer also alleged that the relief sought by plaintiff was barred by the provisions of the Statute of Limitations. The answer admitted that on October 12, 1929, Walter D. Ryan and Marie O. Ryan executed and delivered a promissory note for \$700.00, secured by a trust deed to the Chicago Title & Trust Company, and states that the defendant Emery is the legal owner and holder of said promissory note dated October 12, 1929 for \$700.00, and of the trust deed given to secure the payment of same; that nothing has been paid on account thereof and that the said trust deed is a valid and subsisting first lien on the premises. Defendant Emery also filed a counterclaim wherein he averred that in 1938 he obtained a judgment against Walter D. Ryan; that an execution was issued in May, 1938; that under the execution the real estate was sold by the bailiff to the defendant, and that there was no redemption from the sale; that by virtue of the judgment and sale, defendant Emery has a first and valid lien on all right, title and interest of Walter D. Ryan in the premises, and that by virtue of the trust deed and note dated October 12, 1929, defendant has a valid and subsisting first lien on the premises, subject only to the lien of the judgment, and that the interest of plaintiff and all of the other defendants are inferior and subject to the rights of defendant Emery. The counterclaim prayed that Walter D. Ryan and Marie O. Ryan be required to pay within a short day the amount found due on the indebtedness represented by the trust deed dated October 12, 1929, plus attorney's fees, advances and costs; that in default of payment of the amount so fixed the premises be sold under the direction of the court; that in

case of failure to redeem, all parties be forever barred and foreclosed from all right and equity of redemption. Plaintiff, in an answer to the counterclaim, denied that Cecil Emery was the legal owner and holder of the note and trust deed of October 12, 1929, or that there was any consideration given therefor, or that such trust deed constituted a valid lien on the premises; and also denied that by virtue of the judgment and certificate of sale Emery has a valid first lien on the interest of Walter D. Ryan, and denies that plaintiff's interest is inferior to the rights of Emery. Plaintiff did not file a reply to the answer of Emery. The cause was referred to a Master who made findings in favor of defendant and recommended the entry of a decree in accordance therewith. Exceptions were overruled and the Chancellor decreed that "the defendant, Cecil Emery, be and he is declared to be the owner of an undivided one-half interest in fee simple of the real estate above described, clear and free of any rights or interest of any of the other parties to this cause". The Chancellor also dismissed the complaint and entered a judgment for costs against the plaintiff, to review which this appeal is prosecuted.

Plaintiff's theory of the case is that he has a first lien on the premises sought to be foreclosed as the owner and holder of the trust deed dated December 6, 1917, from John D. Wickstrom to John A. Schmidt, given to secure the principal note of the said John D. Wickstrom in the sum of \$1,800.00, payment of which was extended to December 6, 1926. Defendant's theory is that plaintiff was not the owner and holder of the mortgage indebtedness secured by the trust deed dated December 6, 1917; that the original indebtedness was paid by Walter D. Ryan at a time when he was one of the owners of the equity; that the Statute of Limitations has run against the indebtedness; that the note and trust deed are no longer enforceable; that he, defendant, is the owner of an undivided one-half interest in the premises by virtue of a deed from the Bailiff, free and clear of all rights and interest of the other parties; that the foreclosure proceedings were in fact filed by Ryan in the name of his father-in-law, George W. Wagner, as plaintiff, for the purpose of defeating the interest which defendant acquired by virtue of the judicial sale.

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Plaintiff assails the findings of the Master, charging that they are contrary to the evidence. Plaintiff alleged that he was the owner and holder of the indebtedness secured by the trust deed, the lien of which he sought to foreclose. This was denied by defendant. Therefore, the law imposed a burden on plaintiff to establish the ownership of the note by a preponderance of the evidence. The Master found that plaintiff was never in possession of the notes and trust deed sought to be foreclosed, and that he did not prove ownership of the note and trust deed. We have read the pleadings, the transcript of the testimony and the exhibits, and are of the opinion that the Master was justified in finding that plaintiff was not the owner and holder of the trust deed and note sought to be foreclosed. In Pasdach v. Aux, 364 Ill. 491, the Supreme Court said:

"The master in chancery saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause. (Kenner v. Mette, 239 Ill. 586.) His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. North Side Bash and Door Co. v. Hecht, 295 Ill. 515; Klekamp v. Klekamp, 275 id. 98."

To the same effect is Brainard v. Brainard, 373 Ill. 459, 461.

The Master found that Walter D. Ryan, who was then one of the joint tenants, borrowed considerable sums of money from the plaintiff, who was his father-in-law, and that with such sums of money Ryan paid the indebtedness represented by the note sought to be foreclosed. We are of the opinion that the record supports the finding that the note was in fact paid by Ryan to a bank which was then holding the paper, and that plaintiff did not become the owner or holder of the note or trust deed.

Plaintiff advanced other points. Having concluded that the Master and the Chancellor were right in finding that plaintiff was not the owner or holder of the note sought to be foreclosed, and that such note was in fact paid, we will not extend this opinion by a discussion of the other points.

For the reasons stated, the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

the Supreme Court said:

[illegible]

to the same extent in Minnesota v. Minnesota, 177 U.S. 137, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 9

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PEOPLE OF THE STATE OF ILLINOIS, ex rel.
JOHN S. RUSCH,

Appellee
v.

FRANK B. BILEK, et al.,

On Appeal of IRVING LEIBOLD,

Appellant.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

308 I.A. 327

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On November 13, 1939, John S. Rusch, Chief Clerk of the Board of Election Commissioners of Chicago, filed a petition in the County Court of Cook County alleging that on April 4, 1939, an election was held in the City of Chicago for the purpose of electing a mayor, a city clerk and a city treasurer; that for that election Frank B. Bilek, Irving Leibold and Marie Tresnak were appointed, qualified and acted as judges of election in the 52nd precinct of the 24th ward, that Hirsh Rieff and Arthur Goldberg were appointed, qualified and acted as clerks of election in the same precinct, and that said persons knowingly, fraudulently and unlawfully committed various infractions of the elections laws. On November 13, 1939, the court directed that said parties be attached to show cause why they and each of them, as officers of the County Court, should not be punished for contempt for misbehavior as such judges and clerks of election. Respondents surrendered and were released on bonds. On March 5, 1940, after a trial the court found Irving Leibold guilty and found the other four respondents not guilty. On March 11, 1940, the court entered its judgment order and there found that "respondent Irving Leibold was grossly negligent in separating the straight ballots from the split ballots and because of such negligence the following discrepancies appeared in the recount of the ballots cast in the said 52nd precinct of the 24th ward:

1932
JAMES A. HILL, et al.,
Plaintiffs,
vs.
JAMES A. HILL, et al.,
Defendants.

On appeal of JAMES A. HILL, et al.,

Appellants,

vs. JUSTICE HENRY J. HARRIS, et al.,

On November 11, 1932, James A. Hill, et al.,

board of election commissioners of Cook County, Illinois, filed a petition in the County Court of Cook County, Illinois, alleging that on or about January 1, 1932, an election was held in the City of Chicago for the purpose of electing a mayor,

a city clerk and a city treasurer; that two candidates were qualified, namely, Irving Leibold and Arthur J. Cook, and that the election was held on the 11th day of November, 1932, at the City of Chicago, Illinois.

and that the judges of election in the said precinct at the 11th ward, that Arthur J. Cook and Irving Leibold were qualified, and that the judges of election in the said precinct, and the said

persons knowingly, fraudulently and unlawfully committed various infractions of the election laws, on November 11, 1932, and that

directed that said parties be returned to their homes and that each of them, as officers of the County Court, should not be punished for contempt for disobedience as such judges and clerks of election.

Respondents surrendered and were released on bond, and after a trial the court found Irving Leibold guilty of having

other four respondents not guilty. On March 11, 1933, the court

entered its judgment awarding and there found that respondents Irving

Leibold was grossly negligent in conducting the election and that the split ballots and reports of such negligence and election dis-

crepancies appeared in the report of the election were in the said

32nd precinct of the 34th ward;

	Official Count	Recount	Gain	Loss
Edward J. Kelly	416	397		19
Dwight H. Green	33	50	17	
Ludwig D. Schreiber	414	395		19
John Wm. Chapman	31	45	14	
Thomas S. Gordon	415	394		21
Clement A. Nance	32	48	16	

The order found that the other four respondents had purged themselves of the contempt charge and that they were not guilty of misconduct and misbehavior in office. They were discharged. The order further found that respondent Irving Leibold "by reason of gross negligence in counting the ballots was and is guilty of misconduct and misbehavior as an officer of the County Court of Cook County", and that he was guilty of contempt, and directed him to pay to the Clerk of the County Court the sum of \$100.00 as a fine, and that upon failure so to do that he be committed to the common jail of Cook County until such fine was satisfied either by payment or service in the jail. This appeal is prosecuted for the purpose of reviewing the judgment.

The parties stipulated that respondents were duly appointed and acted as judges and clerks of election in the 52nd precinct of the 24th ward on April 4, 1939, as to the number of votes cast, the counting and tallying and the preservation of the ballots. The record shows that an investigation was conducted to determine whether the election laws were violated in that precinct. The only evidence presented was the recounting of the ballots in open court by the respondents. After such recount, the court addressing respondents said, "And you counted them just the way you are sitting now?" The respondents answered, "Yes". The court continued: "Your name is Tresnak. And Bilek, who is Bilek?" Bilek answered, "That is me". The court (addressing Bilek) inquired, "You did the counting?" and Bilek answered, "I did the counting." From a colloquy between court and counsel, it appears that the matter of the alleged violation of election laws in the city election of April 4, 1939, in the 52nd precinct of the 24th ward was considered by the Grand Jury, and that

Witness	Account	Official Count	Vote
Edward J. Kelly	418	418	17
Wright H. Green	35	35	17
Ludwig D. Schneider	414	414	17
John W. Chapman	41	41	14
Thomas A. Gordon	415	415	21
Clément A. Nance	42	42	14

The order found that the other four respondents had urged themselves of the contempt charge and that they were not guilty of misconduct and misbehavior in office. They were discharged. The order further found that respondent Irving Laidolt "by reason of gross negligence in counting the ballots was and is guilty of misconduct and misbehavior as an officer of the County Court of Cook County", and that he was guilty of contempt, and directed him to pay to the Clerk of the County Court the sum of \$100.00 as a fine, and that upon failure to do that he be committed to the common jail of Cook County until such fine was satisfied either by payment or service in the jail. This appeal is prosecuted for the purpose of reviewing the judgment.

The parties stipulated that respondents were duly qualified and acted as judges and clerks of election in the 24th precinct of the 24th ward on April 4, 1909, as to the number of votes cast, the counting and tallying and the preservation of the ballots. The record shows that an investigation was conducted to determine whether the election laws were violated in that precinct. The only evidence presented was the recounting of the ballots in open court by the respondents. After such recount, the court addressing respondents said, "And you counted them just the way you are sitting now?" The respondents answered, "Yes". The court continued: "Your name is Treanek. And Alik, who is Alik?" Alik answered, "That is so." The court (addressing Alik) inquired, "You did the counting?" and Alik answered, "I did the counting." From a colloquy between court and counsel, it appears that the matter of the alleged violation of election laws in the city election of April 4, 1909, in the 24th precinct of the 24th ward was considered by the county jury, and that

a "no bill" was voted. At the trial the attorney for the respondents, apparently referring to the admitted error in separating straight ballots from split ballots, stated that "the blunder was made right in court again". The court replied "It still makes a difference of 36 votes". The attorney for respondents again called attention to the fact that respondents "made a mistake on the recount". The court then conducted an inquiry as to whether respondents made mistakes in counting the ballots in the November, 1938 election, in the February, 1939 primary and in the June, 1939 judicial election. There were three or four adjournments. The record shows that on March 5, 1940, the trial judge inquired, "What case have we on for today?" The special attorney for the Election Commissioners responded, "The 52nd of the 24th Ward, case No. 637." The court asked, "Well, what did you find?" and the special attorney answered, "The count was the same as when counted in the Board of Election Commissioner's office. This error wasn't committed by the Board. The judges had nothing to do with it, but there were three clerks here". (Apparently he inadvertently transposed the words "judges" and "clerks".) The court then stated, "I will tell you what. The clerks in this case are discharged. I think that Bilek and Miss Tresnak -- I can see their action -- they were twisted up in this whole thing. I don't think they did anything deliberate, but at the same time they threw this out some 36 votes, so I will find Tresnak and Bilek not guilty, and find Leibold guilty and give him a \$100.00 fine".

This court has held that in this type of case the petitioner is required to produce most convincing evidence of the truth of the charges. The record shows that the ballots were recounted in open court by the respondents, and that while recounting they occupied the same relative positions as in the polling place. The record further shows that the trial judge interrogated Bilek as to whether he did the counting and that he answered in the affirmative. Nevertheless, the court purged Bilek, but found Leibold guilty. Apparently, the

a "no bill" was voted. At the trial the attorney for the respondents apparently referring to the admitted error in counting the ballots from split ballots, stated that "the number was more right in court again". The court replied "it still makes a difference of 36 votes". The attorney for respondents again called attention to the fact that respondents "made a mistake on the record". The court then conducted an inquiry as to whether respondents made mistakes in counting the ballots in the November, 1952 election, in the February, 1953 primary and in the June, 1953 judicial election. There were three or four adjournments. The record shows that on March 1, 1953, the trial judge inquired, "has case have on for today?" The special attorney for the Election Commission responded, "The Grand of the State Land, case No. 337". The court asked, "well, what did you find?" and the special attorney answered, "the court can see same as when counted in the Grand of Election Commission's office. This error wasn't committed by the Grand. The judge had nothing to do with it, but there were three of them here". The court inquired, "indirectly transcribed the words 'judge' and 'elector'". The court then stated, "I will tell you what. The clerk in this case was discharged. I think that this and this counsel -- I can take their action -- they were talked up in this whole thing. I don't think they did anything deliberate, but at the same time they know they did some 36 votes, so I will find verdict and will not allow. And I will hold guilty and give him a \$100,000 fine".

This court has held that in this type of case the defendant is required to produce most convincing evidence of the truth of the charges. The record shows that the ballots were recounted in open court by the respondents, and that while recounting they pointed out some relative mistakes as in the voting places. The record further shows that the trial judge interrogated after he had counted the ballots, the counting and that he answered in the affirmative. Nevertheless, the court purged Willard, but found Leibold guilty. Apparently, the

court was of the opinion that Frank Bilek and Marie Tresnak, the other two judges, were the ones who caused the mistake, for he said, "they were twisted up in this whole thing". He excused them, however, because he did not think that they did anything deliberately, but "at the same time they threw this out some 36 votes". Thereupon he found Bilek and Tresnak not guilty and found the respondent guilty. A mere recital of the proceedings before the trial court makes it clear that no convincing evidence of the truth of the charges as to respondent Leibold was presented.

For the reasons stated, the judgment of the County Court of Cook County is reversed.

JUDGMENT REVERSED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

court was of the opinion that Frank Bilek and Marie Lebeck, the other two judges, were the ones who caused the mistake, for he said, "they were twisted up in this whole thing". He knew that, however, because he did not think that they did anything deliberately, but "at the same time they threw out some 35 votes". Respondent he found Bilek and Lebeck not guilty and found the respondents guilty. A mere recital of the proceedings before the trial court seems to clear that no convincing evidence of the truth of the charges as to respondent Lebeck was presented.

For the reasons stated, the judgment of the County Court of Cook County is reversed.

JUDGMENT REVERSED.

REBEL, P.J. AND DEER, J. CONCUR.

41,008

HEDE TANNERT,

Appellee,

v.

CITY OF CHICAGO,
a municipal corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

308 I.A. 327²

MR. JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

Defendant, City of Chicago, brings this appeal from a judgment entered in the Circuit Court in favor of plaintiff Hede Tannert for \$1,000, because of injuries alleged to have been received by plaintiff while walking upon a sidewalk on North Drake avenue in the City of Chicago on December 30, 1937, at about 8:30 A.M. The cause was tried before a judge and jury. The trial court overruled defendant's motion for a new trial.

No point is raised on the pleadings.

Plaintiff's theory of the case is that the City of Chicago negligently and carelessly permitted the sidewalk at the place of the accident to be and remain in a dangerous and unsafe condition; that the uneven and depressed portions of the sidewalk caused plaintiff to insert the toe of her foot in a depression or hole which caused her to stumble and fall upon the pavement thereby causing the injuries of which she complains.

The defendant's theory of the case is that the slight defect in the sidewalk at the time and place of the accident was not such as to impose upon the City of Chicago liability for the injury sustained by plaintiff; that plaintiff at and immediately before the time of the accident was not in the exercise of ordinary

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The case was tried before a jury on May 1, 1907. The jury found for the defendant and returned a verdict of acquittal.

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The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1900, in the several townships of the county of Cook, Illinois, and who have taken the oath of office and qualification on the 1st day of January, 1900.

care for her own safety and was guilty of negligence contributing to her own injury; that the statutory notice served on the city by the plaintiff was fatally defective in that it gave her address at the time she received the injury as 4527 North Drake avenue, while the evidence disclosed that there is no such street address.

The evidence tends to show that on the day of the accident plaintiff was walking south on Drake avenue; that it was a dry day and she walked until she came to Sunnyside avenue and then turned west at the curb to cross to the other side of the street, when the toe of her left foot struck an uneven, jagged depression on the crosswalk, where it joins the pavement and there became "hooked in", causing her to fall to the ground where she remained until she was removed to her home by her husband and Mr. Radu, her neighbor; that Dr. Fleischner, the attending physician, was summoned and he administered treatment to her injuries and had plaintiff taken to the Lutheran Deaconess Hospital; that various X-ray pictures were taken of plaintiff's injured foot and are set forth as exhibits 3, 4, 5 and 6 in evidence, and show a fracture of the bones of the ankle, that is a fracture of the fibula, which it is contended is more serious than fractures of the bone above the ankle and in the opinion of Dr. Fleischner there could be some future or permanent disability to plaintiff's ankle.

The defendant contends that the plaintiff was guilty of negligence contributing to her own injury; that plaintiff having traveled many times by the intersection where she was injured made no effort to avoid being injured at the spot which she knew to be defective.

Defendant further contends that because the alleged defective condition of the sidewalk in question was so slight, no reasonably prudent person would foresee or anticipate injury

resulting from its existence.

Whether or not the plaintiff was guilty of contributory negligence, and whether or not the defendant was guilty of negligence in being responsible for the accident, and whether or not the admitted hole or depression in the street was the proximate cause of the accident or sufficient to cause said accident, was within the province of the jury to decide.

In the case of Wicks v. Cuneo-Menneberry Co., 234 Ill. App. 502, this court at page 509, said:

"We think it clear, under the evidence, that whether plaintiff was exercising due care for her own safety and whether defendant was negligent in failing to keep the iron doors in a proper state of repair were for the jury. And upon a careful consideration of the record, we are unable to say that the finding of the jury in plaintiff's favor on both of these questions is against the manifest weight of the evidence."

In the case of White v. City of Belleville, 364 Ill. 577, it was held that the matter as to the liability of the city because of the different level in the sidewalk was a question for the jury to determine.

In Reule v. City of Chicago, 268 Ill. App. 266, Mr. Justice Wilson, then of this court, at page 271 of his opinion, said:

"It is not negligence per se for a pedestrian to use a sidewalk even though he may have knowledge of a defect therein, nor can it be said as a matter of law that the plaintiff was guilty of contributory negligence in passing under the tree with knowledge that the limb was in poor condition and liable to fall. The question of contributory negligence under such circumstances is one which must be left to the jury.***"

Continuing in that opinion the court quotes from the case of Mattoon v. Faller, 217 Ill. 273, as follows:

"It is, however, well settled law in this State, that, where a man knows of a defect in a sidewalk and walks thereon, his doing so with such knowledge is not negligence per se, as a matter of law. The fact, that he goes upon the sidewalk with knowledge of the existing defect, is a circumstance to be taken into consideration by the jury with all the other facts and circumstances in determining the question, whether he was guilty of

contributory negligence. The same is true as the fact that he might have taken another route to reach his destination than the one which he actually pursued.¹⁴

See also City of Chicago v. Babcock, 143 Ill. 358; Wallace v. City of Farmington, 231 Ill. 232 and Puck v. City of Chicago, 281 Ill. App. 6.

It is further contended by defendant that the notice which was served upon the city was not in compliance with the statute and was fatally defective because it recited an allegedly incorrect address as plaintiff's residence. The residence was described in the notice as 4527 North Drake avenue. The same premises bear the street address of 4529 North Drake avenue and the record affirmatively shows that there was no intervening property or vacancy between 4525 and 4529 North Drake avenue and that by referring to 4527 North Drake avenue, it could only have been reasonably intended to mean the premises immediately adjoining the building at 4525 North Drake avenue. The statute controlling in this regard, Chapter 70, Par. 7, Sec. 2, Ill. Rev. Stats. 1939, does not require that the notice shall state the street address of the claimant, but that his residence be given. There was no duty to specify the street address and the notice was sufficient as given to identify the residence of the plaintiff. McComb v. City of Chicago, 263 Ill. 510; Muela v. City of Chicago, 268 Ill. App. 266; Wagner v. City of Seattle, 146 Pac. 631.

The evidence shows that plaintiff lived at 4529 North Drake avenue, was well known and could have been easily found by making inquiry of the neighbors. There was no building between 4525 and 4529 North Drake avenue, and inquiry at either address would have disclosed plaintiff's address.

Defendant also complains that the court erred in overruling the defendant's motions for a directed verdict, a new trial and judgment in favor of defendant notwithstanding the verdict.

[illegible]

It is further suggested in the report that the
was acting upon the ship and was in control of the
and was finally delivered because he refused to allow himself to
without an attorney's presence. The statement was made by
the writer in that report dated January 1941. The writer
the first report of this case dated March 1941 and the writer
affirmatively stated that there was no intention of
verdict between 1941 and 1942 when the writer was in
reference to 1942 when the writer was in the writer's
intentionally intended to make the writer's intention
the writer of this case dated March 1941. The writer
in this report, dated March 1941, that the writer
does not believe that the writer's intention was to
of the witness, but that the witness is a
that to make the writer's intention and the writer was
as given in the writer's report dated March 1941.

From a review of the record we do not think the court erred and we believe the court was justified in entering judgment on the verdict of the jury.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

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There is a review of the subject of the paper in the
 Court of Appeals and we believe the subject will be discussed in connection
 with the subject of the paper.

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41330

THE TRUST COMPANY OF CHICAGO, as Administrator
of the Estate of STELLA GASZENICZA, Deceased,

Appellant,

THE METROPOLITAN LIFE INSURANCE COMPANY
corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

308 I.A. 328

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

The Trust Company of Chicago, as administrator of the Estate of Stella Gaszenicza, Deceased, brought suit against the Metropolitan Life Insurance Company on a policy of insurance for \$500 issued on the life of Stella Gaszenicza and payable upon her death to her estate. A trial was had in the Municipal Court and the jury returned a verdict for plaintiff for the full amount of the policy. On defendant's motion the trial court entered a judgment non obstante veredicto in favor of defendant, from which judgment this appeal is taken.

Plaintiff's statement of claim alleges that on November 11, 1935, defendant issued a policy of insurance on the life of Stella Gaszenicza for \$500 and that on December 16, 1935, said Stella Gaszenicza died; that on May 29, 1936, letters of administration were issued and granted to plaintiff; that defendant was furnished with proof of death of said insured and that defendant has paid no part of said sum of \$500.

Defendant's affidavit of merits admits that defendant issued said policy of insurance, but denies liability and alleges that the insured was not in sound health at the time the policy was issued, but that the said insured had received medical treatment and hospitalization for diabetes mellitus within two years prior to the date of the policy and that by reason thereof the terms and conditions of said policy had been breached and therefore said policy is void and that the liability of the defendant company is limited to the return of the premiums paid, or \$1.80.

There is no dispute as to the payment of the premiums.

Plaintiff's theory of the case is set forth as follows:

(1) The burden of proving ill health of the insured was on

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NEW YORK 36, N. Y.

1895

THE MEMPHIS POST-RECORD INQUIRY

U.S. DEPARTMENT OF JUSTICE

The Trust Company of Chicago, an administrator of the estate of Stella Gasenlofer, deceased, brought suit against the defendant life insurance company on a policy of insurance for \$200 issued on the life of Stella Gasenlofer and payable upon her death to her estate.

the trial court entered a judgment non est in favor of defendant, from which judgment this appeal is taken.

Wainwright's statement is dated 11 November 1941.

550, numbered and issued a Bureau of Investigation letter of introduction on the 11th of July.

"Defendant's affidavit of service reflects that defendant is not insured and that defendant has not any of said year of 1955. Sent to plaintiff; that defendant was furnished with copy of same. Filed; that on May 23, 1955, letters of notification were received and defendant for 1955 and that on December 14, 1955, said letter was received."

The defendant company is limited to the return of the premium paid. It can be shown that the policy is void and that the liability is not by reason thereof the terms and conditions of said policy and on diabetes within two years after the date of the policy but the said insured had received medical treatment and examination insured was not in sound health at the time the policy was issued, and said policy of insurance, but liability was assigned under the

1898

There is no dispute as to the amount of the overpayment.

of intelligence, a theory of the mind is not enough. It follows:

(1) The burden of proving ill health or disability was on

2
the defendant, and that burden was not sustained;

(2) "Stella Gall" who received medical and hospital treatment for "diabetes mellitus" was not identical with Stella Gasienicza, the plaintiff's intestate;

(3) The jury having heard the evidence presented by both the plaintiff and defendant on the question of the identity of the deceased and the insured, and on the question of the health of the insured at the time the policy was issued, its verdict on those questions of fact is conclusive.

Defendant's theory of the case is (and defendant contends that under the terms and provisions of the policy, where the undisputed evidence shows that insured had received medical and hospital treatment for a serious disease "diabetes mellitus" within two years prior to the policy date which was not disclosed in the application, and that the insured was not in sound health as of the date of the issuance of the policy, the company may declare the policy void and is liable only for return of premiums.

The evidence shows that a policy of insurance was issued by the defendant insurance company upon the life of Stella Gasienicza, at her request, on November 11, 1935; that she was 18 years old at the time and that on December 16, 1935, she died; that defendant refused to make payment under the policy, but tendered \$2.08, representing premiums and interest, which was tendered and refused.

The evidence further shows that the application for insurance was executed by the insured on October 23, 1935, in which she stated she was in sound health; that she had not been under treatment in any clinic, hospital, etc. within the past five years, nor had she been under the care of any physician within the past three years and had never had diabetes. Said application also recited that the answers made were for the purpose of inducing the company to issue a policy of insurance.

The evidence further shows that the policy issued by the defendant company on November 11, 1935, provided that the company assumes no obligation other than return of premiums, and may declare the policy

the defendant, and this is not in dispute;

(2) "Bell's" who received medical and dental treatment

for "diabetic mellitus" was not treated with insulin,

the plaintiff's interest;

(3) The fact that the defendant received treatment by both

the plaintiff and defendant on the question of the liability of the

defendant and the insured, and on the question of the liability of the

insured at the time the policy was issued, the liability on these questions

is conclusive.

Defendant's liability at the time of and before the accident that

under the terms and provisions of the policy, which was not

evidence shows that insured had received medical and dental treatment

for a serious illness "diabetic mellitus" within two years prior to

the policy date which was not disclosed in the application, and that

the insured was not in sound health at the time of the issuance of

the policy, the company may decline the policy and is liable only

for return of premium.

The evidence shows that a policy of insurance was issued by

the defendant insurance company upon the life of the insured, and

on November 11, 1935; that the policy was in force at the time

and that on December 18, 1935, the day after the accident, the

insured was under the policy, but deceased, and the company

thereafter, which was issued and returned.

The evidence further shows that the application for insurance

was executed by the insured on November 11, 1935, in which was stated and

in sound health; that she had not been under treatment in any illness,

hospital, etc. within the last five years, nor had she been under the

care of any physician within the last three years and had never had

diabetes. This application also recited that the insured was sane and

purpose of insuring the company to issue a policy of insurance.

The evidence further shows that the policy issued by the

defendant company on November 11, 1935, provided that the company assume

obligation after the death of the insured, and pay to the beneficiary

void if the insured was not in sound health on the date of issue, or if the insured, within two years before date of issue, had been attended by a physician for any serious disease or complaint.

We think the decision of this case is controlled mainly, if not completely, by determining whether or not the insured Stella Gasienicza is one and the same person as Stella Gall who was treated for diabetes in the Cook County Hospital.

The evidence shows that the report of the Department of Police discloses that Stella Gall was removed from her home at 4530 South Fairfield Avenue to the Cook County Hospital on December 16, 1935, and that she died at the Cook County Hospital the same day at 1:50 P.M.

Mary Janovietz, sister of the insured, testified that the insured was taken from her home at 4530 South Fairfield avenue to the Cook County Hospital on December 16, 1935, about nine o'clock in the morning and that on the same day about two o'clock in the afternoon she heard that her sister had just died; that her sister was 18 years and two months old.

The report of the Department of Police further shows that Stella Gall was 18 years of age and "a known diabetic" and died on the date aforesaid at 1:50 P.M.

The custodian of the Cook County Hospital record produced the records in their original condition and testified that he did not know who wrote "alias Stella Gasienicza" after the name "Stella Gall" which appeared thereon.

Dr. Deutsch, whose deposition was read in evidence, identified the Cook County Hospital record of "Stella Gall" of August 12, 1935, at which earlier date she had been in the hospital for diabetes, and stated that he was an interne at said hospital at that time and that the hospital record was in his handwriting; that he remembered writing the patient's history and that he wrote it down as the patient gave it to him.

old if the answer was not in some way to the fact of being, 24
 the insured, within two years before date of issue, but was not
 a physician for any reason known or suspected.

He thinks the location of this case is not a valid reason, is
 completely, by determining whether or not the insured was
 a resident of Cook County at the time of the death, as the location
 or residence in the Cook County Hospital.

The evidence shows that the records of the Department of Public
 Health that "John" was removed from the home at 1200 North
 Dearborn Avenue on the Cook County Hospital on November 12, 1933, and
 that she died at the Cook County Hospital the same day at 1:30 P.M.
 Mary Janowski, sister of the insured, testified that the
 insured was taken from her home at 1200 North Dearborn Avenue to the
 Cook County Hospital on November 12, 1933, about nine o'clock in the
 morning and that on the same day about two o'clock in the afternoon
 she heard that her sister had just died; that her sister was 15 years and
 two months old.

The report of the Department of Public Health shows that
 John was 15 years of age and a known diabetic, and died at the
 Cook County Hospital at 1:30 P.M.

The custodian of the Cook County Hospital records produced
 the records in their original condition and testified that he did not
 know who wrote "John" and "John" and that the name "John" was
 which appeared thereon.

Dr. Tupper, whose investigation was made in Chicago, identified
 the Cook County Hospital records of "John" as being of August 12, 1933, at
 which earlier date was not seen in the hospital for treatment, and
 stated that he was an intern at this hospital in 1933 and that
 the hospital records are in his handwriting; that he remembered writing
 the patient's history and that he wrote it down at the hospital after it

Objection is made to the testimony of Dr. Deutsch. We think the objection leveled at that deposition should have been made prior to the trial and ruled upon.

Although it is conceded that the burden is upon the defendant insurance company to prove its defense as interposed in this case, we think from a consideration of all the evidence that the "Stella Gall" who was admitted to the Cook County Hospital on the dates aforesaid was the same person as Stella Gasienicza in whose name the policy of insurance herein was issued.

The evidence presented in this case, such as the age of the insured, the street address of the Gasienicza family, the time of the insured's removal from her home to the Cook County Hospital and the hour of her death, almost conclusively prove that Stella Gall and Stella Gasienicza were one and the same person. Had it been otherwise, doubtless ample proof would have been available to have established such fact.

From a review of the entire record we are satisfied that the trial court was justified in substituting its verdict for that of the jury, and for the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

Objecting to both in the testimony of Dr. Hester,
he thinks the objection involving it has been made and that
there would be no trial and other work.

Although it is understood that the matter is now the
defendant's property, it is not the property of the
in this case, as the defendant is not the owner of the
first the "Ladies Club" was not admitted to the club until
on the date otherwise and the same person as the defendant in
which name the policy of insurance was issued.

The witness testified in his case, that in the case of
the insured, the policy was issued to the defendant family, the
time of the insured's death was in the year 1900, and
the fact that the sum of \$10,000, which was the sum of the
first \$10,000 and \$10,000 was the sum of the sum of the sum
thereon. It is also stated, however, that the sum of the sum
has been paid to the defendant family.

From a review of the entire record in the case, it is
the trial court was justified in refusing to grant the sum
of the sum, and for the reasons herein given the judgment of
the court is affirmed.

Very truly yours,

Wm. H. Hester, Jr.,

FRED KOTEK,

Appellee,

CHARLES KOTEK,

Appellant.

APPEAL FROM

JOHN VOKATY, ANNA VOKATY, JOSEPH DIVISEK
and EMILY DIVISEK,

SUPERIOR COURT

COOK COUNTY.

Intervening Petitioners,
Appellants.

308 I.A. 328

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

In this case a bill was originally filed for an accounting between two brothers who had entered into a partnership. After a full hearing in the accounting between the brothers, a decree was entered in favor of Fred Kotek and against Charles Kotek. An appeal was then taken to this court and the decree of the Superior Court was here affirmed. Kotek v. Kotek, 296 Ill. App. 641. In the former appeal, the intervening petitioners here, signed the appeal bond and, apparently, they now wish to avoid their liability thereunder. The original decree found that there was due to plaintiff from defendant the sum of \$3,238.01 as his share of the partnership profits, the partnership having terminated December 31, 1931. The decree further found that the plaintiff and the defendant each were entitled to an undivided one-half interest in a piece of real estate, and that a division and partition of said premises be made. The judgment for \$3,238.01 was the balance due plaintiff as a result of the accounting in the partnership matter proper and was separate and apart from the interest of the parties in the real estate, but, as heretofore stated, came as a result of the partnership transaction. After the sale of the real estate in a partition proceeding, the court re-referred the matter to a master for an accounting of the rents received and for the moneys disbursed in connection with said real estate ownership and for the expenses in connection with the said partition proceedings. Apparently, there is no dispute as to the amount chargeable to the defendant for rents which were collected by him from the premises and

for occupancy of a portion of the premises after a dissolution of the partnership.

It further appears, and it is agreed, that the rentals amounted to \$12,345.00 and that the defendant is entitled to a credit of \$4,445.00 for maintenance of the premises, leaving a balance of \$7,900.00, out of which sum the plaintiff is entitled to one-half or \$3,950.00.

After the appeal in the former case to this court and the affirmance of said judgment therein, the same not having been paid to the defendant at the time of the partition sale, the chancellor ordered that the judgment, entered as a result of the accounting relative to the partnership, be paid out of the share of the defendant which was coming to him as his share of the amount realized from the partition sale of the real estate. Evidently, the sureties on the appeal bond thought the court erred in ordering the payment of the partition suit money to be applied on the accounting suit judgment.

We have been unable to find in the briefs that the sureties have paid the debt for which they are liable, but, assuming that they have, we are asked to treat the claim of the intervening petitioners as a subrogation of the defendant's claim arising from the sale of the real estate.

No question is raised as to the pleadings.

Plaintiff's theory of the case is that plaintiff was equitably entitled to have the distributive share of proceeds of sale belonging to the defendant, Charles Kotek, applied first in payment of the sum found to be due from said defendant to plaintiff for use and occupancy of and rentals collected from the premises sold; that the right, lien or equity of the plaintiff in said proceeds and his right to have them applied first in payment of said rent were prior and superior to the right, lien or equity of intervening petitioners (sureties upon appeal bond of Charles Kotek) in the proceeds of sale; that the intervening petitioners were not equitably entitled to have the proceeds of sale applied to the judgment entered May 15, 1936, and that the intervening

for occupancy of a portion of the premises after a dissolution of the partnership.

It further appears, and it is agreed, that the rentals amounted to \$2,345.00 and that the defendant is entitled to a credit of \$4,415.00 for maintenance of the premises, leaving a balance of \$7,500.00, out of which the plaintiff is entitled to a credit of \$3,000.00.

After the appeal in the former case to this court and the affirmance of said judgment therein, the case not having been held to the defendant at the time of the partition sale, the commissioner ordered that the judgment, entered as a result of the accounting relative to the partnership, be paid out of the share of the defendant which was coming to him as his share of the amount realized from the partition sale of the real estate. Evidently, the parties on the appeal bond thought the court erred in ordering the payment of the partition sale money to be applied on the accounting sale judgment. We have been unable to find in the briefs that the parties have paid the debt for which they are liable, but, assuming that they have, we are asked to treat the claim of the intervening petitioners as a subrogation of the defendant's claim arising from the sale of the real estate.

No question is raised as to the plaintiff's.

Plaintiff's theory of the case is that plaintiff was entitled

entitled to have the distributive share of proceeds of sale belonging to the defendant, Charles Foster, applied first in payment of the sum found to be due from said defendant to plaintiff for use and occupancy of and rentals collected from the premises sold; that the right, lien or equity of the plaintiff in said proceeds and his right to have them applied first in payment of said sum and rentals was superior to the right, lien or equity of intervening petitioners (petitioners upon appeal bond of Charles Foster) in the proceeds of sale; that the intervening petitioners were not equitably entitled to have the proceeds of sale applied to the judgment entered May 10, 1920, and that the intervening

petitioners were not equitably entitled to be exonerated from their liability upon said appeal bond.

The theory of defendant and intervening petitioners (sureties) is that by virtue of the affirmance of the decree entered May 15, 1936, the intervening petitioners (sureties) became liable to the plaintiff in the amount of said judgment and interest thereon; that the defendant, Charles Kotek, was in duty bound to pay said judgment of May 15, 1936, from the proceeds of sale belonging to the defendant for the benefit and protection of the sureties upon his appeal bond (intervening petitioners); that the intervening petitioners (sureties) were equitably entitled to have the distributive share of the proceeds of sale belonging to the defendant, Charles Kotek, applied first to the payment of said judgment of May 15, 1936, under their right of subrogation and indemnity; that equity demands the exoneration and discharge of the sureties (intervening petitioners) from their liability upon the appeal bond filed herein by the proper application of the proceeds of sale of the real estate; that by virtue of the terms and conditions of the order of sale entered July 7, 1939, the plaintiff could only apply upon his bid his respective share of the proceeds of sale and any sum of money found due to plaintiff prior to such sale, namely: the amount found due to plaintiff under the decree of May 15, 1936; that defendant was equitably entitled to have the judgment of May 15, 1936, paid and satisfied from the proceeds of sale belonging to defendant to protect the sureties upon his appeal bond (intervening petitioners) and that the manner of distribution of the proceeds of sale decreed by the Chancellor in effect altered the terms and condition of the order of sale, and writes a new contract for the sureties in that the sureties will be required to pay an obligation determined long after they had entered into their contract and which they had not contracted to pay.

petitioners were not equitably entitled to be compensated from their

liability upon said appeal bond.

The theory of defendant and intervening petitioners (sureties)

is that by virtue of the allowance of the appeal bond, July 1, 1936,

the intervening petitioners (sureties) became liable to the plaintiff

in the amount of said judgment and interest thereon; and the

defendant, Charles Koser, was in duty bound to pay said judgment and

May 18, 1936, from the proceeds of said bond, and the defendant for

the benefit and protection of the sureties upon said appeal bond (inter-

vening petitioners); that the intervening petitioners (sureties) were

equitably entitled to have the representative share of the proceeds of

sale belonging to the defendant, Charles Koser, applied first to the

payment of said judgment of May 1, 1935, and the interest thereon at that

date and interest; that equity demands the protection and discharge

of the sureties (intervening petitioners) from said liability upon

the appeal bond filed herein by the proper application of the proceeds

of sale of the real estate; that by virtue of the terms and conditions

of the order of sale entered July 1, 1936, the plaintiff could only

apply upon his bid his respective share of the proceeds of said sale

any sum of money found due to plaintiff prior to said sale; namely:

the amount found due to plaintiff under the terms of May 1, 1935;

that defendant was equitably entitled to have the judgment of May 1,

1936, paid and satisfied from the proceeds of sale belonging to

defendant to protect the sureties upon said appeal bond (intervening

petitioners) and that the manner of distribution of the proceeds of

sale decreed by the Chancellor in respect of said sale and conditions

of the order of sale, and which a new contract for the purchase of

that the sureties will be required to pay an additional amount found

after they had entered into their contract and which they had not

contracted to pay.

After reading the theories of the contending parties to this suit, as set forth in the briefs, we cannot discover wherein the court in the exercise of its equitable powers, did other than mete out justice as between the two parties. Here arose a situation wherein a judgment of the trial court was affirmed by this court, the amount of the judgment not having been paid and satisfied until the chancellor who, having money in the court's possession which belonged to the debtor, decided that the creditor should receive his money, and so ordered. In this regard we do not think error was committed. A wide latitude is accorded a chancellor in the matter of adjusting accounts between contending parties, the ultimate object of his function being to administer justice as between the parties.

No question of law is involved in this case. The parties agree as to the facts and we are of the opinion that the chancellor was right in his decision.

For the reasons herein given the decree of the chancellor of the Superior Court is affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

After reading the transcript of the proceedings before the
this suit, as set forth in the bill, we cannot discover wherein the
court in the exercise of its appellate powers, did error. The
out justice as between the two parties. There was no error in
judgment of the trial court was affirmed by this court, the amount
of the judgment not having been paid and satisfied until the execution
was, having money in the court's possession which belonged to the
debtor, decided that the creditor should receive his money, and so
ordered. In this regard we do not think error was committed. A wide
latitude is accorded a chancellor in the matter of adjusting accounts
between contending parties, the ultimate object of his function being
to administer justice as between the parties.
No question of law is involved in this case. The parties
agree as to the facts and we are of the opinion that the chancellor
was right in his decision.
For the reasons herein given the decree of the chancellor
of the Superior Court is affirmed.

CHANCERY DIVISION

WHEEL, P.J. AND BURKE, J. CONCUR.

41443

WOODLAWN UNION BAPTIST CHURCH, an
Unincorporated Religious Organization,
WILLIAM MOON, WILLIAM H. FURN, JOHN
COLLINS, JOHN TUCKER and C. J. WHITE,
FIELD, Deacons, and JAMES C. COBBIN,
J. S. BROOKS, FLETCHER BERRY, HAROLD
H. FARRELL and JAMES H. HARRISON, Trustees

Appellees.

INTERLOCUTORY APPEAL

FROM THE SUPERIOR COURT,

COOK COUNTY.

v.

HAMILTON D. MARTIN, J. P. POLK, PINKNEY
HALL, LOUIS BAXTER, W. H. WEBB, LOGAN
WATSON, E. S. LEWIS, LEVI SIMS, HARROLD
CLAY and JAMES H. OLDHAM,

Appellants.

308 I.A. 329

MR. JUSTICE DENIS E. SULLIVAN delivered the opinion
of the court.

On January 8, 1940, the Superior Court of Cook County
granted an order for a temporary injunction restraining the defend-
ants, their agents and attorneys from holding or attempting to hold
any meeting for the purpose of electing officers or transacting
any other business in and for the Woodlawn Union Baptist Church,
and further restraining the defendants from molesting or in any
way interfering with Mr. Harrold H. Farrell in the collection of
certain rents. On April 13, 1940, the defendants filed their
amended motion to dismiss the complaint and therein pleaded a
decree entered in the Circuit Court of Cook County on June 19, 1939,
which it was asserted decided the issues favorably to the defendants.
In their amended motion the defendants contended that the decree of the
Circuit Court was res judicata as to the matters and things
asserted by the complaint on which the injunction order was based.
On May 29, 1940, the Superior Court of Cook County denied defendants'
motion to dismiss and ruled the defendants to answer the complaint
within 20 days. On June 12, 1940, the defendants filed a motion
to dissolve the injunction. The chief ground set out in the latter

WASHINGTON, D. C. 20540
 DEPARTMENT OF JUSTICE
 DIVISION OF INVESTIGATION
 OFFICE OF THE ATTORNEY GENERAL
 OFFICE OF THE INSPECTOR GENERAL
 OFFICE OF THE COMPTROLLER OF THE COURT
 OFFICE OF THE SECRETARY OF THE ARMY
 OFFICE OF THE SECRETARY OF THE NAVY
 OFFICE OF THE SECRETARY OF THE AIR FORCE
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF AGRICULTURE
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF COMMERCE
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF EDUCATION
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF LABOR
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF TRANSPORTATION
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF THE INTERIOR
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF ENERGY
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF DEFENSE
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF AERONAUTICS AND SPACE
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF AGRICULTURE
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF COMMERCE
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 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF AERONAUTICS AND SPACE

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 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF ENERGY
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF DEFENSE
 OFFICE OF THE SECRETARY OF THE DEPARTMENT OF AERONAUTICS AND SPACE

308 L.A. 329

On January 2, 1964, the Attorney General of the United States
 advised the President of the United States that the Department of Justice
 was conducting an investigation into the activities of the
 American Revolution Party, a group which claimed to be a
 legitimate political party and which claimed to be the
 only party in the United States which was not controlled by
 the government. The investigation was conducted by the
 Federal Bureau of Investigation, which is a part of the
 Department of Justice. The investigation was conducted
 in order to determine whether the American Revolution Party
 was a legitimate political party and whether it was
 controlled by the government. The investigation was
 conducted in order to determine whether the American
 Revolution Party was a legitimate political party and
 whether it was controlled by the government. The
 investigation was conducted in order to determine whether
 the American Revolution Party was a legitimate political
 party and whether it was controlled by the government.

motion was that the cause was adjudicated in the Circuit Court. On June 28, 1940, the court overruled defendants' motion to dissolve the injunction and directed the defendants to file their answer within 5 days. On July 26, 1940, the defendants filed an appeal. Section 78 of the Civil Practice Act allows an appeal from an interlocutory order granting an injunction or dissolving an injunction.

An appeal from an interlocutory order granting an injunction or overruling a motion to dissolve the same must be taken and the record filed in this court within 30 days from the entry of such interlocutory order, unless the court grants further time for filing such record. The appeal was taken and the record in the instant case was filed in this court on July 26, 1940, which was within 30 days from the date when the order overruling the motion to dissolve the injunction was entered. However, the chief point on which appellants rely in this court is that "the decree entered in this cause is void on the doctrine of res adjudicata, the same subject-matter herein involved having been conclusively settled and adjudicated in a former proceeding between the same parties." The brief of appellants concludes by asking that we enter an order "reversing the decree entered by Judge Lupe on May 29, 1940, and that the decree entered by Judge Prystalski in case No. 39 C 2646 dismissing the bill for want of equity be sustained." The order entered by Judge Lupe on May 29, 1940, is the order denying the motion of defendants to dismiss the complaint and directing that the defendants answer within 20 days. The defendants did not elect to stand on their motion. Had they elected to stand on their motion then a final decree could have been entered and the parties could have appealed from such final decree. As we have seen, they filed another motion to dissolve the injunction. However, they are now attempting to attack the action of Judge Lupe

On June 22, 1944, the Court delivered its opinion which, with the
majority of the Justices, was signed by Chief Justice Charles E. Hughes.
The Court held that the Government was justified in its action.

[illegible]

in denying their motion to dismiss the complaint. An appeal from an interlocutory order may not be prosecuted except where it is allowed by statute. Defendants have no right to prosecute an appeal from the interlocutory order entered on May 29, 1940. What they are attempting to do is to have us pass on a nonappealable interlocutory order entered by Judge Lupe on May 29, 1940. We cannot entertain this appeal. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

HEBEL, P.J. AND BURKE, J. CONCUR.

in writing this letter to inform the President. In regard to
an infectious agent, we are not aware of any other cases in the
United States. We believe that the agent is a new one, and
appears from the infectious agent which we have isolated.
That they are attempting to do so to keep the agent in a laboratory
infectious agent which we have isolated in the United States.
Correct subject in this matter. Therefore, the agent is infectious.

THE UNIVERSITY OF CHICAGO

Finis E. Downing, Complainant v. William B. Finn, et
al., Defendants, William B. Finn, Cross Com-
plainant, and Appellee, v. Centennial
National Bank, Cross Defendant and
Appellant

Gen. No. 9223

MR. JUSTICE HAYES delivered the opinion of the
Court.

This is an appeal from a decree entered May 19, 1939, in the Circuit Court of Sangamon County, decreeing that the Centennial National Bank account to the cross complainant and appellee William B. Finn, for all moneys paid by Finn to the Bank, the Virginia Building and Savings Association, Henry McDonald, Henry Jacobs, or either or any of them, for or on account of the purchase by Finn, in March, 1917, of a certificate of purchase for the Opera House property in Virginia, Illinois, issued to Henry Jacobs pursuant to a Master's Sale held March 20, 1916, and all damages sustained by Finn by reason of the foreclosure decree having been subsequently held void; and allowing the Bank credit for cash paid to Finn for attorneys' fees and court costs; and ordering the bank to cause to be returned to Finn, all notes and other obligations given by Finn to the Bank, the Virginia Building and Savings Association, Henry McDonald or Henry Jacobs.

Jacobs purchased the Opera House property at a foreclosure sale held on March 20, 1916, and the Certificate of Purchase was sold to Finn on March 9, 1917. The mortgagor, claiming the foreclosure decree to be void, brought ejectment against Finn in 1922, which was decided in Finn's favor in 1924, and a statutory new trial was taken.

On June 14, 1926, the mortgagors, Downing and his wife filed a bill in the Circuit Court of Cass County to redeem against Finn, the Bank and others. On January 6, 1931, the Downings obtained a decree finding the foreclosure sale void and permitting him to redeem upon payment of the mortgage indebtedness. On October 14, 1932, Downing paid in to the Master, the

sum of one thousand six hundred fifty two dollars and twenty cents (\$1,652.20), being the amount found necessary to redeem.

On August 31, 1933, Finn filed a Cross Bill against the Bank, on which the decree here reviewed was entered, contending that the Bank was liable to him for alleged loss and damages on account of alleged misrepresentations and fraud made by the Bank in the sale of said certificate. Said Cross Bill alleged, that Finis E. Downing made a mortgage to M. A. Jones on lot seventy six (76), in the town of Virginia, and also made a mortgage to J. J. Bergen; that Bergen assigned his mortgage to the Centennial National Bank; that the Bank filed a bill to foreclose on its mortgage; that Jones filed a Cross Bill; that the property was sold by the Master to Henry Jacobs, to whom a certificate of purchase was issued; that said certificate of purchase was procured by Jacobs for and in behalf of the Centennial National Bank, and that Jacobs held said Certificate in behalf of the Bank. It further alleged, that Henry McDonald was Cashier of the Bank; that said McDonald requested the complainant William B. Finn to purchase the certificate; that Finn was unable to handle it on account of finances; that McDonald offered to make all financial arrangements; that McDonald assured Finn that the title would be sound and without any defects; that the bank would see that Finn was protected; that Downing would not redeem, and that the proceedings in the foreclosure suit were regular. Further allegations show that Finn relied on said representations; that Henry McDonald was also Secretary of the Virginia Building and Savings Association, which had common offices with the Bank in the same building; that Finn purchased said certificate for nine thousand (\$9,000.00) dollars at the direction of the Bank; that he made his note for six thousand (\$6,000.00) dollars to the Virginia Building and Savings Association, and secured the same by a first mortgage on the real estate; that he delivered his note for three thousand dollars payable to Henry Jacobs, for the balance; that the Bank delivered to Finn the certificate of purchase endorsed by Henry Jacobs; that a Master's Deed was executed on said lot seventy six, and that Finn improved said real estate and expended large sums of money for material and labor. Said Cross Bill further alleged that after the original bill in this cause was filed and served on Finn, he inquired of the Bank the nature of the suit and was

told by the Bank's Cashier, Henry McDonald, that there was nothing to the proceeding; that Finn should dismiss the same from his mind; that the Bank would attend to the suit and do all that was necessary; that the Bank would fully protect Finn against any loss and harm, and that Finn should not employ counsel or give the suit any further attention. Finn further alleges, that he depended on this statement and did not hire an attorney; that up to that time he had had no notice or knowledge that any fraud had been committed on Downing in the original foreclosure suit; that the Bank was represented by Epler C. Mills and Ed. D. Henry, and that Finn had no knowledge that these lawyers were representing him. Finn asked that a decree be entered against the Bank to reimburse him for all the losses and damages suffered on account of said alleged fraud and misrepresentations committed by the Bank.

The Bank answered said Cross Bill and denied all the material allegations therein contained, and set up as a matter of defense, the Statute of Frauds and the Statute of Limitations, and the matter was referred to the Master in Chancery to take proofs.

The original parties in this suit were Finis E. Downing, complainant, and the Centennial National Bank and William Finn and others, defendant. A decree was entered, under date of November 26, 1930, finding that the foreclosure had been a fraud upon the mortgagor, and ordering that it be set aside. From this decree no appeal was taken. Said decree found, "That the Centennial Bank filed its bill to foreclose its mortgage at the October Term, 1914, in the Circuit Court of Cass County; that J. J. Neiger was the Bank's regular attorney, but the bill in behalf of the Bank was filed by a lawyer by the name of Charles Martin; that Neiger filed an answer for M. A. Jones and a Cross Bill to foreclose his mortgage, at which time there was then no default in payment on the Jones mortgage; that Neiger prepared the decree of foreclosure and had general charge of the suit; that neither the mortgagor nor his wife was served with summons or copy of the bill nor was notice of its pendency published; that on October 6, 1914, by agreement between Downing and the Bank, a receiver was appointed to collect the rents, and it was agreed that the Bank would withhold prosecution of its foreclosure suit; that Downing offered the Bank additional security; that the Bank sent its Vice President to St. Louis to check on the additional security; that the Bank agreed to

accept the additional security and found it satisfactory; that on October 12, 1915, while Downing and the Vice President of the Bank were in St. Louis, Neiger presented the Master's partial report in the foreclosure suit to Circuit Judge Higbee, and had an order entered, 'decree of foreclosure and sale, see order signed,' all without notice to Downing or affording him an opportunity to oppose or object; that the decree was not signed or approved by the Circuit Judge but it was agreed that a decree be prepared and submitted to the lawyers in the case and mailed to Judge Higbee at Pittsfield for his signature; that Neiger immediately prepared a decree and Leeper OK'd it on behalf of the Downings, and it was sent to Judge Higbee at Pittsfield for his signature; that upon his return to Virginia and upon learning what had transpired, Downing informed Leeper that he had no authority to enter his or his wife's appearance, or to O.K. any decree; that Leeper thereupon withdrew from the case; that Downing notified Judge Higbee that Leeper had no authority; that Judge Higbee refused to sign the decree and assured Downing that he would have a hearing on his objections and returned the decree unsigned to Neiger; that on October 21, 1915, Downing filed an affidavit in the cause in support of his objections; that on January 10, 1916, Neiger presented the decree with Leeper's O. K. thereon to Judge Guy R. Williams as a consent decree, although Neiger then knew that Downing was objecting to the decree; that Leeper no longer represented him; that the same was not a consent decree and there had been no default taken as to Downing; that this conduct on the part of Neiger constituted a fraud on the Court; that Judge Williams was without jurisdiction to decide a contested matter upon evidence taken before another Judge of the same court; that the Deputy Clerk testified that he filed the decree presented to Judge Williams, but this supposed decree was never recorded but was immediately taken from the Deputy Clerk by solicitors for the complainant or Cross complainant in the foreclosure suit; that it never appeared as part of the files in the Circuit Court, or as part of its records; that the decree of foreclosure should be set aside, vacated and declared void; and that Downing and his wife should be entitled to redeem the Opera House property."

Under the terms of said decree, it was adjudicated that the foreclosure proceedings and sale thereunder, including the certificate of purchase, were void; that

a fraud had been committed in obtaining the order of sale, the foreclosure, and the issuance of the certificate of purchase in question, and that said certificate was absolutely void and worthless from the time of its execution. It is a fair deduction that the lawyers who obtained the decree of foreclosure, the order of sale, and the issuance of the certificate perpetrated this fraud for and in behalf of the Bank, with notice and knowledge to the Bank's agents and attorneys. Therefore the Bank is chargeable with the same.

The Bank contends that Henry Jacobs purchased the Opera House at the foreclosure sale, and obtained the certificate of purchase for himself; that the Bank had nothing to do with it, and that McDonald in selling the property to Finn acted in behalf of Jacobs and not for the Bank. On this question there is severe conflict between the testimony of Finn and that of the Bank's cashier, McDonald. Finn testified that he had been dealing with the Bank as a depositor for fifteen years; that about the first of January, 1917, he went into the Bank to make a deposit; that Henry McDonald the Cashier, propositioned him on buying the Opera House, as he was running a picture show on the east side of the Square and the Opera House was running a picture show on the west side, and business was split so that nobody was making any money; that McDonald pointed out to him that if he bought the Opera House, he would get it out of the road; that Finn replied that he was unable to handle the deal financially; that McDonald volunteered to furnish the finances; that about ten days later McDonald told him that the Bank and the Savings Association officials would furnish the money; that about the middle of February McDonald talked to him the third time, and stated that the Savings Association would furnish six thousand dollars and that Henry Jacobs would take the balance of three thousand dollars on the building; that McDonald then told him that the period of redemption would be up on June 20, 1917, and they would give him good title; that he inquired of McDonald if the mortgagor would stir up anything; that McDonald assured him that the Bank would protect him; that the note for three thousand dollars to Jacobs was for three years; that at the end of the three years the Bank took the three thousand dollar note over; that Finn had gone into possession of the property in March, 1917, and started running the picture show which he bought from Jacobs; that he held the property for fifteen years and

made valuable and permanent improvements; that Downing had started a suit against him in trover in 1919; that McDonald took care of it and paid the expense of it; that Downing filed a suit in ejectment in 1921; and that the Bank paid for the attorney fees in defending it. He further testified that after the Court had held the mortgage sale fraudulent and McDonald had told him the Bank would take care of the matter; that he was unwilling to make further payments until the title was clear; that the Building and Savings stock matured in 1927, and that he refused to leave the six thousand dollars go to pay the said note until his title was straightened out and he got the six thousand dollars in cash.

McDonald, the cashier of the Bank, contradicts Finn on the material parts of Finn's testimony, and testified that the Bank had no interest in the certificate issued to Henry Jacobs; that Jacobs had asked him to find a buyer for the certificate, and that Jacobs paid him \$150.00 for selling the same to Finn. He denies, that he ever told Finn that the Bank officials had instructed him to sell the building to Finn; that Jacobs had bought the Opera House property for the Bank; that the Bank would see that he got good title; that Downing would not redeem; or that the Bank would go ahead and defend the suits. The weight of his testimony is weakened by his explanation of the reason the Bank paid the \$250.00 for Finn's lawyer in defending the ejectment suit was "He was a bank customer and had bought the building on my solicitation, and I did it to avoid any talk on the street, and telling it around town. Finn had always been a great fellow to talk and tell his troubles around uptown."

McDonald, in his testimony, denied that the Bank paid the Master's fees in the suit to redeem, which had been brought against Finn and the Bank, and then when he was shown the Bank Book, in which a credit to Finn for these fees appeared, he stated that the Bank might have given him the money just to keep him in good humor, "like we did that attorney fee once before."

At the time the case was tried, Henry Jacobs was deceased. Jacobs sold the certificate to Finn for nine thousand dollars,—the exact amount he paid for it,—and took Finn's note for three thousand dollars due in three years. The six thousand dollars which McDonald had obtained from the Building and Savings

Association was a first lien on the Opera House. When the three thousand dollar note came due, the Bank, acting through McDonald, took the note and carried it in the Bank. Finn refused to pay either the six thousand dollars or the three thousand dollars until the Bank furnished him a good title. Under the testimony of Finn, and from March, 1917, until August, 1933, McDonald succeeded in keeping Finn quiet by promising to make the title good; by taking care of the defense of the law suits which had been brought by Downing and by paying the expenses and attorney's fees in connection therewith. In the meantime, there had been a suit brought by Downing in trover in 1919, the ejectment suit in 1922; and the bill for redemption in 1926. Finn claimed, in his testimony, that the Bank hired the lawyers to defend the redemption suit, but asked him to help the lawyers; that Finn testified in the case and signed all the papers they asked him to, and that he had no lawyers representing him, but depended on the Bank to take care of him.

Taking the record as a whole, there is ample proof in it to justify the findings of the Master, which were approved by the Chancellor. The obtaining of the foreclosure in the first instance, and the issuance of the certificate of purchase, were a fraud upon the court; in which the Bank, through its agents, had participated. The selling of the certificate, which was a spurious instrument, by McDonald to Finn, amounted to fraud and deceit, for which the Bank was responsible.

Fraud in its general sense comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence, resulting in damage to another. (*Bundesen v. Lewis*, 291 Ill. App. 83). There is no general rule for determining what fact will constitute it, but it is to be found or not according to the special facts of each particular case. It may consist of a misrepresentation, that is, in the positive assertion of a falsehood, or in the creation of a false impression by words or acts, or by any trick or device, or in a concealment or suppression of the truth, or in both a suggestion of falsehood and a suppression of the truth altogether. (*Bundesen v. Lewis*, *supra*).

A calm, deliberate and careful analysis of the evidence in this record leads but to one conclusion, that fraud is established by such clear and convincing evidence that leaves the mind well satisfied that the allegations are true.

The proofs established that the certificate of purchase, which the Bank got Finn to buy, was obtained by fraud, of which the defendant Bank had knowledge. Under these circumstances, the Statute of Frauds is no defense, for the purpose of the statute which is to prevent frauds would be defeated.

It was held by the Chancellor that Finn's right of action accrued September 12, 1932. He filed this action the following August. Our statute provides that if a person, liable to an action, fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has cause of action and not afterwards. (1939 Ill. Bar Assoc. Statute, Ch. 83, Par. 23, Sec. 22). The Bank, through McDonald, had Finn under its control. Finn was unaware of his rights until the final decree was entered in the redemption suit, and he was dispossessed. He filed this suit, within a year after he had knowledge of his cause of action, so the Statute of Limitations is not a bar.

Appellants assign error on the following language in the decree: "That said Centennial National Bank, shall also account for all notes and other obligations executed by said William B. Finn or executed by anyone for him, and delivered to said Centennial National Bank, said Building and Savings Association, Henry McDonald or Henry Jacobs, or any or either of them." This paragraph of the decree should be modified so as to limit it to the transaction in question. The decree should be further modified so as to charge Finn with the rent, or reasonable value of the use of the Opera House while he was in possession, as against the expenditures that he is claiming credit for.

The decree should be further modified so as to read: "Within thirty days after the Master's report has been approved of by the Court, to pay the Master for the use of William B. Finn," in lieu of the language now in said decree, "within thirty days thereafter pay to said Master for the use of William B. Finn."

The Circuit Court of Sangamon County is hereby directed to modify its decree as herein provided, otherwise said decree for the reasons set out in this opinion, is affirmed and said cause remanded to the Circuit Court of Sangamon County for said modifications and for the accounting therein provided in said decree.

Decree affirmed in part, modified in part, and remanded for further proceedings. The costs in this case are to be divided equally between the parties.

Affirmed in part, modified in part, remanded.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1940

Term No. 13

Agenda No. 12

WILLIAM ROUSSIN,
Plaintiff-Appellant,
vs.
RALPH KIRKBRIDE,
Defendant-Appellee.

Appeal from
Circuit Court of
Madison County

CULBERTSON, J.

308 I.A. 366²

This is an appeal from a Judgment non obstante veredicto rendered by the Circuit Court of Madison County, Illinois, in favor of Ralph Kirkbride, Appellee (hereinafter called Defendant), after a jury had returned a verdict for Appellant, William Roussin (hereinafter called Plaintiff), in the sum of \$15,000.00.

The action was instituted by Plaintiff for injuries sustained by him on December 17, 1937, when he alleges he was struck by a truck driven by Jack Ballard, the agent and servant of the Defendant herein, and for such sums as he had expended or become liable for, or will in the future be required to spend in an effort to be cured of his injuries.

The specific negligence charged is, negligent failure to keep a proper look-out ahead for persons and vehicles rightfully upon the highway, speed in excess of 45 miles per hour, and that the Defendant so carelessly, negligently, and improperly drive, managed and operated his said automobile truck that by reason thereof the same was caused to run into and strike against the Plaintiff.

The Defendant's Answer admitted the public character of the highway at the place in question, and denied that Plaintiff was in the exercise of due care and caution, and admitted that a certain truck was stopped at the place in question, and denied that any part of it was on the east shoulder or that

it was stopped 20 feet south of the place where the Plaintiff was standing or walking, and denied, generally, that Plaintiff sustained any injury as a result of the negligence of the Defendant or his servant. In addition thereto, the Defendant, under Division 2 of his Answer, interposed the defense that the Workman's Compensation Act, as defined in Section 3, applied to both Plaintiff and Defendant, and that there could be no recovery by Plaintiff in this case for that reason.

The injuries of Plaintiff consisted of: double compound fractures in the bones of both legs, and that Plaintiff's left leg had an infection in it and the Doctor removed the entire muscle therefrom; that at the first time Plaintiff saw his left leg after the accident, the whole top of it was open and a piece of bone 3 inches was missing, and that he never saw that leg again. Plaintiff's right leg had pins through the heel, with a horseshoe like thing on it, with weights hanging down on it to stretch it, and remained in this traction splint for several months. After 6 months and 2 weeks in the hospital Plaintiff was taken home, but was unable to stand on his leg and was taken back to the hospital. There the Doctors found that the bones had not reunited, so they drilled 36 holes in the shin bone and cut the small bones in half again. After a few days in the hospital on that occasion, Plaintiff was returned to his home, and was brought back to the hospital on several occasions, and finally, on April 18, 1938, approximately 5 months after the accident, his left leg was amputated about 3 inches below the knee, and in April, 1939, an artificial leg was obtained, which was being worn by Plaintiff at the time of the trial. Plaintiff's right leg gets stiff and he is unable to move his toes, and he wears an elastic bandage on his right leg. His right ankle is stiff all of the time. He had a large cut on his right arm below the elbow, and several fingers on his right hand were fractured, and the small finger and the ring finger on his right hand, at the time of the trial, were still so that he could close it only about half way. His left arm was broken above the wrist, and at the time of the trial, had completely healed and he had no disability therefrom.

The injuries Plaintiff sustained caused much pain and were still causing pain at the time of the trial, and Plaintiff testified that, since the time of the accident, he had never known what it was to be without pain.

Plaintiff testified that he had never returned to work and that he could not walk without the aid of two crutches, and that at the time of the accident, he was a strong, healthy, vigorous man, able to perform the duties of a furniture mover and had always been engaged in that work, and was earning \$25.00 per week and had regular employment, and that since the accident he had not earned anything.

Plaintiff further testified that his doctor bills amount to \$2475.00; his bill for nurses, between 5 and \$600.00; the brace for his right leg cost \$32.50; and that his bill at the Lutheran Hospital amounts to \$1,000.00; and the artificial leg cost \$150.00. The permanency and seriousness of Plaintiff's injuries, and the amount of money he has expended or become liable for in connection therewith, stand uncontradicted in the Record.

The Plaintiff further testified that he was a married man, 39 years of age at the time of said trial, and lived in St. Louis, Missouri; that he was a moving-van operator, employed by Carl Klem of St. Louis, Missouri; that at about a quarter after five on the afternoon of December 17, 1937, he was involved in an automobile accident on U. S. Highway No. 67. Said highway runs in a general north and south direction, and is a paved concrete road, approximately 20 feet wide, and at the place of the accident the highway is level and straight. The shoulders on the east and west sides of the pavement had not been completed, and were soft and muddy.

Plaintiff further testified that he left St. Louis at about 3:00 o'clock in the afternoon, and that he was going to Wood River and East Alton to pick up some auto parts for his "Boss". He was operating an autocar-stake truck. The truck was empty. Plaintiff further testified that as he was proceeding northwestwardly along the highway just south of the

town of Hartford, the truck suddenly developed carburetor trouble; that he was traveling between 25 and 30 miles per hour and the carburetor started spitting and choking up, and the motor died. He tried to pull the truck off the highway, but when the wheels hit the mud on the east shoulder, the truck stopped and would go no farther; that after the truck developed the carburetor trouble it traveled about 15 feet before it came to a stop, and the truck was stopped with about one-third on the south shoulder, to the east of the pavement, and about two-thirds on the pavement. The two wheels on the right-hand side were completely off the pavement. He testified that he then got out and lifted the hood and began working on the carburetor, but could not locate the trouble, and that he then stopped a car going north and asked the driver of the car to take him to Hartford. Plaintiff stopped at a filling station in Hartford and asked for a mechanic and called his "Boss" in St. Louis. The mechanic and Plaintiff went back to fix the truck, but the mechanic couldn't find out what was wrong and returned to his station to get a tow-chain. Plaintiff further testified that he stayed at the place where the truck was parked, and that it was about 4:00 o'clock and still daylight when his truck first stalled.

Plaintiff further testified that when the mechanic left, he "fooled around a little with the truck" and then turned the lights on and went back to see if the tail-light was burning, and that it was burning, and at that time it was just turning dusk. He then walked about 35 or 40 feet in front of his truck to see how far the headlights could be seen, and turned around and saw that the lights were all right. He then turned to the north to see if the man was coming with the tow-chain, and when he looked north he saw no automobile coming from that direction, and that he then started walking south, on the east edge of the pavement, back toward the front of his truck. He noticed a truck coming from the south, which in his opinion, was traveling between 45 and 50 miles per hour, about a half block from the rear of his truck. At that time, Plaintiff testified, he was about 25 feet in front of his truck, and

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that he turned again and looked to the north, and then heard a violent crash that sounded like two cars coming together, which crash was made by the collision between the truck that he had seen coming from the south, and Plaintiff's truck. Plaintiff further testified that before he could get out of the way, or move, the truck was right on top of him and struck him, and that it swerved around in front of his truck and struck him when he was from 20 to 25 feet north of his truck, and that at the time it struck him it was moving pretty fast; that it struck Plaintiff at his shins, right below his knees, and that he was rendered unconscious.

Plaintiff testified that he did not see the truck after the accident; that he does not know how he was taken from the scene of the accident; and did not know anything about the accident until a couple of weeks later when he discovered that he was in the Lutheran Hospital in St. Louis.

Al. Paul, Jr., a witness offered on behalf of Plaintiff, testified that, he resided at Mitchell, Illinois, in December, 1937, and was engaged in the garage business; and that on December 17, 1937, Mr. Spicer, who was working for him, drove, with this witness, in his tow-truck to pick up a truck, and when they got to the scene of the collision there were two trucks - one was a panel truck, and the other a large, stake-body truck; that the panel truck was a Plymouth; that they had a crane on their truck that was situated in the rear; that when they arrived at the scene of the accident, that Plaintiff's truck was standing on the east side of the road, headed north, with the right two wheels off the pavement on the shoulder of the road; and that the panel truck was standing about 8 or 10 feet behind it, angling off east, with its right front wheel off on the shoulder; and that the radiator on the panel truck was shoved back, and the cowl light at the bottom of the windshield and the whole right side of the body was shoved in, and the right front door was hanging down. The witness further testified that the wheels of the Plymouth were not hurt, and that it could have been rolled; and that he towed the big truck in,

and that in doing so, he broke a chain pulling the big truck onto the road, and the chain flew back and broke the windshield on Plaintiff's truck. The witness further testified that when he got to the scene of the collision he saw Plaintiff about 25 feet in front of his truck, off in the ditch about 8 or 10 feet over to the right of the highway, and that he helped carry Plaintiff up onto the shoulder of the road and place him in the ambulance. He further testified that when he got to the scene of the collision the headlights and the tail-light were burning on the Plaintiff's truck.

The witness, Dale Spicer, offered on behalf of Plaintiff, testified that, he went with his employer, Mr. Paul, to the scene of the accident; that when he got there Plaintiff's truck was standing with the right wheels off the pavement onto the shoulder of the road, facing in a northerly direction; that the Plymouth panel truck was about 8 or 10 feet behind it; that the shoulder on the east side was muddy; and that he assisted in getting Plaintiff to the ambulance.

The witness, Jack Widman, testified that, he was a truck driver on December 17, 1937; that as he was driving south on Route 67 he saw the accident involved in this case, but did not see it happen, and as he was coming down the road he could see lights burning on Plaintiff's truck, and recognized Plaintiff's truck; that when he got to the scene of the collision he saw the young driver of Defendant's truck, a Mr. Ballard; that he passed on by; that Defendant's truck was sitting behind the Plaintiff's truck; that he stopped and pulled over onto the shoulder and went back and asked Mr. Ballard what was wrong, and that Mr. Ballard told him that he had had an accident and had "hit a man." When Mr. Ballard was examined on behalf of Defendant, on his direct examination he stated, among other things, "I might have told Mr. Widman what happened - what I thought had happened at that particular time - to my knowledge I did not tell him that I had hit a man."

At the close of the evidence for the Plaintiff a Motion was made by the Defendant, requesting the Court to

instruct the jury to find the defendant "not guilty," and the ruling on the Motion was reserved by the Court.

The Defendant called, as one of his witnesses, Jack Ballard, who testified that, he lived at Carrollton, Illinois and was employed by Sears and Roebuck as a salesman, and that on December 17, 1937, he was driving a cake truck for the Defendant in this case and had been so employed for about two months. He further testified that he had driven automobiles since he was 16 years of age, and had had about 5 years driving experience, and that the truck he was driving at the time of the collision was a 1937 Plymouth panel truck. He further testified that it was in good shape and that the lights were all right, and the motor was all right, and that the accident in question occurred about 5:10 in the evening. He testified that he started out on the trip that morning at about 6:30 and went from Carrollton to East St. Louis, and that he was in East St. Louis all day selling cakes, and that he left there to return home at about 4:30 in the afternoon.

He further testified that it was misty and that he had his lights burning from about 3:00 o'clock on; that he left East St. Louis on Route 67, and that it was about 16 miles from where he left in East St. Louis, to the place of the accident; and that when he reached the junction of Routes 66 and 67 it was dark and misting. He further testified that as he was driving north he met cars traveling in the opposite direction and that he was traveling about 30 to 40 miles an hour, and that the truck would not go over 43 to 48 miles an hour because it was equipped with a governor. He further testified that the headlights from the cars that he met "kinda blinded him" and that just before he got to this truck he met a car and its lights blinded him, and that after the car passed him, there was the truck, and that all he could do was to swerve to miss it. He further testified that he didn't miss the truck, and didn't get around it, and that his truck stopped with the right front end partly submerged under the left rear end of the truck plaintiff had been driving, and that his truck lodged in that position.

He further testified that when he met this car that blinded him he dimmed his lights and just momentarily after that car passed him, this truck loomed up in front of him, and that when he first saw the big truck he thought he could reach out and touch it, and that he applied his brakes and tried to miss it by swerving to the left. He further testified that he did not know whether his brakes had any effect, but that his headlights were burning at the time of the accident, and that he was driving in the neighborhood of from 30 to 40 miles an hour, and that it was dark when he struck the truck. He further testified that he was dazed and that he got out on the left-hand side of his truck and walked around behind it and onto the shoulder of the highway, and that when he got around there, and just ahead of his truck and near the rear end of his truck, he found a cap about in a direct line with his rear wheel, on the shoulder of the road about 2 or 3 feet from the pavement. He picked it up and saw that it had a Missouri chauffeur's license on it, and that he walked to the other side and looked underneath his truck, and then walked south down the road, but could not find anyone, and then walked north and then, for the first time, he saw Plaintiff about 10 feet off the shoulder, northeast of his truck, and that Plaintiff was unconscious, and that he wasn't over 10 feet from the front of his truck, about midway on the shoulder.

He further testified that he went out to flag cars and to get help, and that a car loaded with 6 young boys en route to St. Louis came by, and they assisted him in moving his truck, which projected over the black line on the west side of the pavement; and that they placed the truck possibly 10 feet back of the truck Plaintiff had been driving, with the right side off the pavement. None of these young men appeared as witnesses. He further testified that his car was "out of commission" as a result of the impact and would not operate on its own power, and that his truck did not strike the Plaintiff that "he knew of" and that he did not back his truck from in front of the truck Plaintiff had been driving and put it behind that truck.

The witness Bitzer testified that, he operated a garage at Collinsville, Illinois, and that he got the Plymouth truck driven by the witness Ballard, for the purpose of repairing same, and that the damage to the truck started at the right head lamp and continued along the right side of the hood, and it mashed the cowl, crushed the cowl and right door, and the right door lock pillar, and that they made certain repairs to the truck.

At the close of all the evidence in the case the Defendant made a Motion for a directed verdict, and the Court reserved its ruling on said Motion, and marked the same "Reserved."

At the request of Defendant there was given to the Jury 5 Special Interrogatories, as follows:

"Interrogatory No. 1. Do you find from the evidence that before or at the time the plaintiff sustained the injuries in question in this case, the defendant, either by himself or through the driver of his truck, was guilty of negligence in the operation and management of his truck, which proximately caused the said injuries sustained by plaintiff? Answer:

"Interrogatory No. 2. Do you find from the evidence that the plaintiff was not struck by the defendant's truck and that plaintiff was not injured as the result of the collision of the two trucks?

Answer:

Interrogatory No. 3. Do you find from the evidence that either just before or at the time the plaintiff sustained the injuries in question in this case, he was not in the exercise of due care and caution for his own safety, and that by reason of his failure to exercise such care and caution he contributed to his said injuries?

Answer:

Interrogatory No. 4. Was the driver of defendant's truck, Jack Ballard, just before and at the time plaintiff sustained the injuries in question in this case, the agent or servant of defendant? Answer:

Interrogatory No. 5. Was the driver of defendant's truck, Jack Ballard, just before and at the time plaintiff sustained the injuries in question in this case, guilty of any negligence that proximately caused plaintiff's said injuries?

Answer:"

and said interrogatories were answered, as follows:

No. 1 - in the affirmative

No. 2 - in the negative

No. 3 - in the negative

No. 4 - in the affirmative

No. 5 - in the affirmative

The verdict of the jury found the issues in favor of the Plaintiff and assessed his damages at \$15,000.00.

On February 17, 1940, the Court allowed a Motion for a Judgment non obstante veredicto and on that date entered a Judgment against Plaintiff, in bar of action and for costs.

It is urged in this Court, by the Defendant, that the Court's action in allowing the Motion for a judgment non obstante veredicto was correct and proper for the reason that, there is not a scintilla of evidence to support a verdict in favor of the Plaintiff, and for the further reason that the evidence presented upon the part of the Plaintiff did not fairly and reasonably tend to show that Plaintiff's injuries were proximately caused by negligence on the part of the Plaintiff, as charged in the complaint, because it was inherently improbable and entirely inconsistent with the physical circumstances surrounding the accident.

We are disposed to, and do hold, that there was vastly more than a scintilla of evidence on which a verdict could have been rendered in favor of the Plaintiff in this case. The Jury adopted the Plaintiff's theory of this case and found for him. It is quite true that under Defendant's theory of this case there could, of course, be no recovery by the Plaintiff, but it seems to us that this presented a well-defined issue of fact that has had the attention of a jury and they have

adopted Plaintiff's theory of this case, and we would not be disposed to interfere with their verdict.

In passing upon a Motion for a judgment notwithstanding the verdict, the question raised is the same as that raised by a Motion for a directed verdict at the close of the testimony, and the Court must consider the facts solely in the light most favorable to the Plaintiff, disregarding all contradictory testimony and contradictory inferences in favor of the Defendant (BLUMB v. GETZ, 366 Ill. 273, 274; FARMER v. ALTON BUILDING & LOAN ASS'N., 294 Ill. App. 206, 209; GARDINER v. RICHARDSON, 293 Ill. App. 40, 44; FISHER, ETC. v. ASSOCIATED UNDERWRITERS, 294 Ill. App. 315, 322; THOMASON v. CHICAGO MOTOR CO., 292 Ill. App. 104, 110; REMBKE v. BIESER, 289 Ill. App. 136; LE MENAYER v. NORTHWESTERN STEEL & WIRE CO., 301 Ill. App. 260; 22 N. E. (2nd) 710; OLLIVER v. KELLY, 300 Ill. App. 487).

The testimony, viewed in the light most favorable to the Plaintiff, tended to show that the Plaintiff was struck by the Defendant's motor truck while the Plaintiff was in the exercise of due care for his own safety, and as a result of negligence in the operation of the Defendant's motor truck. Plaintiff's testimony involved no physical impossibility nor any matters contradictory of common knowledge. The Court was, therefore, not justified in entering a judgment notwithstanding the verdict against the Plaintiff, even though the Court may have been of the opinion that the Defendant's testimony controverting that of the Plaintiff, was more credible CHICAGO, ETC. RY. v. HAGENBACK, 228 Ill. 290; ZIRALDO v. LYNCH, 365 Ill. 197; LE MANAYER v. NORTHWESTERN STEEL & WIRE CO., Supra; SYNWOLT v. KLANK, 296 Ill. App. 79, 86; CAPELLE v. CHICAGO N. W. RY. CO. 280 Ill. App. 471; ILLINOIS TUBERCULOSIS ASS'N. v. SPRINGFIELD MARINE BANK, 282 Ill. App. 14.

The action of the Trial Court in allowing the Motion for a Judgment non obstante veredicto was, in the opinion of this Court, erroneous, and it is, therefore, the judgment of this Court that such action be reversed, and that the Judgment non obstante veredicto be set aside, and that Judgment be entered

on the verdict in favor of the Plaintiff.

No error having been assigned by the Defendant herein that would have warranted the allowance of his alternative motion for a New Trial in the event the Motion for a judgment notwithstanding the verdict had been denied by the Trial Court, this Court, accordingly, will set such Judgment non obstante veredicto aside, and enter judgment on the verdict in this Court in the sum of \$15,000.00 in favor of the Plaintiff, and against the Defendant, together with costs.

Reversed, and judgment
entered here.

Mr. Presiding Justice dissents.

FILED

OCT 28 1940

David J. Mallon

CLERK OF THE APPELLATE COURT
- CHIEF CLERK OF ILLINOIS

11 App
Adm. Pt. 3

1517

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present --- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 438

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

1. The purpose of this document is to provide information regarding the security of the information contained herein.

2. This document is classified as CONFIDENTIAL - SECURITY INFORMATION.

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
OCTOBER TERM, A.D. 1940.

ROYAL AGER,

Plaintiff-Appellee,

vs.

TRAVELERS CASUALTY INSURANCE
COMPANY, a corporation,

Defendant-Appellant.

Appeal from the
County Court of
Kankakee County.

WOLFE, -- P. J.

On November 20, 1939, the appellee, Royal Ager, who was a molder by trade, while carrying a mold tripped and fell and struck a board with his right side in the lower part of his abdomen, which caused him to have severe pains, and to stop working immediately. He resumed work for a day and a half when the pain again caused him to quit working. He was later taken to St. Mary's Hospital in Kankakee, and on December 6, 1939, he underwent an operation. He remained in the hospital 15 days, and was then taken home and he remained in bed about three weeks. His doctor did not come to see him every day, but did come once every seven days. After the fourth week, at the direction of the attending physician, he went to the doctor's office for examination and treatment. During the last six weeks of his disability, he stayed at his home except for a visit to the doctor's office once a week, and occasionally, upon the doctor's order, he went out of the house into the open air.

The plaintiff, who had an Accident and Health Policy with the Travelers Casualty Insurance Company, started a suit in the Circuit Court of Kankakee County, against said Company, to recover on the policy for his disability. The pleadings set forth the issuance of the policy and the injury to the plaintiff, and asked damages. The defendant filed its answer admitting the issuance of the policy and proof of loss, but denied the extent and necessity of confinement, as alleged in the complaint, or its liability under the policy to the extent claimed by the plaintiff. The case was submitted to a jury, who found the issues in favor of the plaintiff, and the Court rendered judgment in his favor for \$210.00. It is from this judgment that the appeal is prosecuted. The appellant insists that the policy in question is a limited one, and that under the facts and circumstances, the insured was not entitled to recover the full amount under the policy, and that the confinement of the defendant was not caused by the accident in question, but was due to a hernia, and therefore the policy must be interpreted in that manner in favor of the insurer. It is the contention of the appellee that the plaintiff's hernia resulted from a violent and external injury, which the insured received when he fell against the board in question.

The plaintiff gave his testimony as to how the accident happened and of the length of time he was in the hospital, who his attending physician was, and the length of time that he was confined to his home. Doctor George I. Erwin, a Physician and Surgeon of Kankakee County, Illinois, testified to the condition in which he found the plaintiff shortly after he was injured; that he performed an operation on the plaintiff December 7, 1939; that he had had experience in the treatment and repair of hernias and that it is his opinion

that the hernia of the plaintiff was the result of an injury. The doctor further testified as to the treatment he gave the plaintiff; that he advised him how to care for himself in order to be cured of his affliction; that in his opinion, from what he knew of the actions of the plaintiff, that his conduct was compatible with the advice that he had given him; that while he did not actually treat him, all the time, he saw the plaintiff frequently, and was under the doctor's observation during the time in which he claims compensation under the policy. This evidence is undisputed.

In the case of Rowden v. Travelers Protective Ass'n. of Am., 201 Ill. App. 295, the same form of policy of insurance was before the Appellate Court as in this case, and in passing upon it the Court uses this language: "It was a question of fact whether the original nonprogressive hernia contributed to the injury that caused the death of the insured. If the original hernia was the cause of the operation, which resulted in the death of the insured, then there would not be any liability, but if the hernia which necessitated the operation was the result solely of the fall, then the exception in the rules does not exempt appellant from liability. The rules of appellant, except death from surgical operations occurring within three months of the accidental injury from the exemptions from liability. An accident policy insuring against death from bodily injuries resulting from external accidental means but excepting death from hernia does not relieve the insurer from liability where death results from hernia caused by external violent and accidental means. Travelers' Ins. Co. v. Murray, 16 Colo. 296; Miner v. Travelers' Ins. Co., 3 Ohio Dec. 289; Atlanta Accident Ass'n v. Alexander, 104 Ga. 709." It is our conclusion that the evidence

about the future of the situation and the future of the country.

The doctor further explained that the situation was very serious.

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in this case shows that the hernia of the plaintiff was caused by the accident in question, namely, his falling against a board and injuring his side.

It is next insisted by the appellant that the evidence shows that plaintiff was not confined to his home or some hospital, as required by the terms of the policy, or treated continuously by a physician. In the case of Moore vs. Standard Accident Insurance Company, 245 App. 300, the Appellate Court of the First District, was discussing a similar question and uses this language: "The only reasonable conclusion to be drawn from this evidence is, that the appellee is totally and permanently disabled and can never follow his occupation; that no medical treatment would improve his condition. In many cases the purpose for which accident insurance is written would be defeated, if there could be no recovery for an injury which did not require the regular attendance of, and treatment by a physician." Recovery may be had if the insured was under the care of a physician even though no treatment was administered. To the same effect is Commercial Casualty Company vs. Campfield 243 Ill. App. 453. Paul vs. National Accident Society 249 Ill. App. 302. The evidence shows that the provisions of the policy were complied with by the plaintiff.

It is contended by the appellant that the instructions given by the Court were contradictory and calculated to confuse the jury in regard to the material issues in the case, therefore the judgment should be reversed. Our Courts have held that the Appellate Courts will not reverse a judgment for error in the instructions to the jury, or admission of evidence, where under the evidence, the jury

in this case there was the right of the committee to demand for
the evidence in question, namely the written statement of each and
every member of the committee.

It is not possible to see how the committee can be required to
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could have rendered no ~~fair~~^{other} verdict consistent with the case.
Campbell vs. Lindley 256 Ill. App. 476; Vinson vs. Scott 198 Ill.
542. Under the evidence in the case as presented by this record,
the jury could not have consistently rendered any other verdict
than that which they did, so the error, if any, in the giving of
the instructions is harmless.

The judgment of the Trial Court will be affirmed.

Affirmed.

[illegible]

100

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 438²

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF THE HISTORY OF ARTS
AND ARCHITECTURE
AND THE MUSEUM OF ART AND ARCHITECTURE

THE UNIVERSITY OF CHICAGO PRESS

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CHICAGO, ILLINOIS

1955

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A.D. 1940.

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

PATRICK D. FAHEY,

Plaintiff in Error.

Error to
Circuit Court
of Will County.

WOLFE, -- P. J.

Patrick D. Fahey, the plaintiff in error, was indicted in the Circuit Court of Will County for conspiracy to cause illegal votes to be cast at the election held in Will County on June 5, 1939. The case was tried before a jury which returned a verdict finding the defendant guilty and assessing a fine of \$2,000.00. The Court then orally instructed the jury that they had no right to assess a fine against the defendant. The jury then retired and returned a second verdict of guilty without any recommendation as to punishment. The Court overruled motions filed by the defendant for a new trial, and, in arrest of judgment, and sentenced the defendant to serve 9 months in the County Jail in Will County, and to pay a fine of \$1,000.00. It is from this judgment that a writ of error is sued out by the defendant.

IT IS

ORDERED THAT THE

COMMISSIONER OF

THE STATE OF

ILLINOIS,

VS.

VS.

ILLINOIS

Ex. 101. 2607

Parties to the case, the defendant in error, was indicted in the

County Court of this County for commission of murder in the

first degree, to wit: on the 10th day of June, 1907.

The case was tried before a jury which returned a verdict of guilty

and defendant jointly and severally liable for the same.

The jury returned a verdict for the State in the sum of

the sum of \$10,000.00. The State has failed to establish a

second verdict of guilty without any recommendation of the

jury. The Court overruled the motion of the defendant for a new

trial, and, in award of judgment, the defendant was sentenced to

serve 9 months in the County Jail in full payment of the fine

of \$1,000.00. It is the duty of the Court to award the

fine by the defendant.

The State's case is based almost entirely upon the uncorroborated testimony of Alfred (Rip,) Edwards, who is by his own evidence, shown to be a self-confessed accomplice. His testimony is to the effect that he conferred frequently with the defendant, prior to the election of June 5, 1939, for the purpose of having illegal voters brought into Joliet to vote at the judicial election held on that date; and that pursuant to said arrangement with Fahey, he did bring illegal voters into Joliet who voted at said election. He went into detail concerning the conversations which he had had with Fahey and others, and told of meetings and conversations which they had had with the illegal voters.

Shortly after the election, the witness, Rip Edwards, with others, was arrested and placed in the City Jail in Joliet. Rip Edwards remained in jail 74 days, at the end of which time he was released on bond. During the time he was in jail he told the officers that he was not guilty of any offense. While in custody he wrote letters to Fahey demanding money, and told him that 'if he did not come across with some money,' and 'come up with a bond,' he was going to become a State's witness and testify against him. He admits that he instructed his Lawyer, Francis Dunn, to go over to Mr. Fahey, and demand money, and if he, Fahey, did not pay, he was going to implicate Fahey in this election vote fraud. He testified that Fahey told him, and also told Mr. Dunn, that he, (Edwards,) could not blackmail him, and he refused to have anything to do with Edwards. He further states that when Fahey refused to send him any money, or pay his attorney any money, that he then called "Jim Burke," the State's Attorney of Will County, and told him that he himself was guilty, and also that Fahey was implicated in the vote fraud.

[illegible]

The evidence of Alfred (Rip,) Edwards shows that he had been convicted of felony to-wit: of rape, and had served time in the penitentiary; that he had been a professional gambler, and that he had lied to parties in regard to his part in the vote fraud.

The defendant testified in his own behalf and denied any and all participation in any conspiracy in any and all vote frauds. The witness, Rip Edwards, was discredited in many respects, as to the occurrences and where he met and had conversations with Fahey. The evidence shows conclusively that on election day when Edwards says he had conversations with Fahey, that Fahey was in an attorney's office on different matters practically the entire day. Edward's statement that he had been in Mr. Fahey's Office on certain days is contradicted by Agnes McCarthy who is Mr. Fahey's Stenographer. In addition to the evidence of the defendant, fourteen reputable witnesses from Will County, appeared in behalf of the defendant and testified his general reputation for truth and veracity was good in and around Joliet, Illinois. John M. Genco, a witness called on behalf of the defendant, testified that he was a machinist for the Texaco Oil Company, and formerly Deputy Sheriff of Will County; that he knew Rip Edwards since boyhood; and knew his general reputation before June 5, 1939, for honesty and integrity, and that his reputation was bad. There is no evidence in the record rebutting this testimony.

It is first insisted that the Court erred in giving the jury the Plaintiff's Instruction No. 20, which is as follows: "The Court instructs you that the testimony of an accomplice is competent evidence, and the credibility of such an accomplice is for the jury to pass upon as they pass upon the credibility of any other witness. The testimony of an accomplice must be received with great caution, but if the testimony carried conviction and the jury are convinced

has filed to parties in order to be able to take care of them.

Definitely; that has been a substantial amount, and that is

convicted of felony to-wit: of course, and that money is not

any evidence of money to be given to the parties.

the defendant testified in the two years and six months
between the two trials that he was not in contact with the
defendant.

of its truth they should give it the same weight as would be given to the testimony of a witness who is in no respect implicated in the offense." This instruction had been repeatedly condemned by our Supreme Court. In the case of the People vs. Lawson 345 Ill., 428, at Page 430, the Court uses this language: "The sixth instruction given at the request of the prosecution reads as follows: "The court instructs the jury that the testimony of an accomplice is competent evidence, and the credibility of such accomplice is for the jury to pass upon as in the case of any other witness; and while the testimony of an accomplice will sustain a verdict when uncorroborated, yet such testimony must be received with great caution; but if the testimony carries conviction and the jury are convinced of its truth, they should give to it the same effect as would be allowed a witness who is in no respect implicated in the offense. This instruction is not a correct statement of the law, and, for that reason, was held erroneous in People v. Rongetti, 338 Ill., 56. The jury, in determining the credibility of an accomplice, are governed by the rule that his testimony is subject to grave suspicion and should be acted upon with great caution. The jury should carefully consider such testimony in the light of all the other evidence in the case and the influence under which the testimony was given in order to determine whether the purpose of the witness was to shield himself from punishment, to obtain some personal benefit or advantage or to gratify his malice. If, after all the facts and circumstances in evidence are considered, the uncorroborated testimony of an accomplice is of such a character as to prove guilt beyond a reasonable doubt, it will authorize a verdict of guilty. (People v. Rongetti, supra; People v. Elmore, 318 Ill., 276; People v. McKinney, 267 id. 454; People v. Rosenberg, 267 id. 202). The sixth instruction asked by the People omitted

of its truth they should give it the same weight as if it were
to the testimony of a witness who is in no respect impeached
the officer. This testimony is not hearsay, and it is not
our business to say. In the case of the witness, we should
and, at the same time, the jury should be instructed that
attention given to the testimony of the witness is not
"The court instructs the jury that the testimony of the witness
is competent evidence, and the credibility of such testimony is
for the jury to determine. In the case of the witness, the
while the testimony of the witness is not hearsay, and it is
and, therefore, the jury should be instructed that the
testimony of the witness is not hearsay, and it is for the
convicted of the crime, that would be the same as if the
would be allowed a witness who is not a witness, and it is
offense. This instruction is not a correct statement of the law,
and, for that reason, we will instruct the jury to disregard
338 Ill., 52. The jury, in determining the weight to be
accorded, are governed by the testimony of the witness, and it is
to give evidence and to give it the same weight as if it were
The jury should carefully consider each witness in the case and
all the other evidence in the case and the testimony of each witness
the testimony, and give it the same weight as if it were
of the witness who is a witness, and it is for the jury to
some personal belief or opinion, and it is for the jury to
after all the facts and circumstances, and it is for the jury to
the instructions given to the jury, and it is for the jury to
to prove with the same weight as if it were
a variety of things, and it is for the jury to
313 Ill., 270; People v. [Name], 307 Ill., 434; People v. [Name],
287 Ill., 302. The first instruction given to the jury is correct.

essential qualifications and should not have been given." To the same effect is *The People vs. Rongetti* 338 Ill., Page 56; *The People vs. Witzman* 362 Ill., Page 11.

The defendant in error, in its printed brief and argument does not contend that this instruction is proper, and should have been given, but the only defense of this instruction is that the error, if any, is cured by defendant's given instruction No. 17. Several cases are cited as sustaining this contention, but an examination of those cases discloses that the instruction complained of was not a mis-statement of the law, but a lack of some element that should have been included in the instruction, and the Court in such cases held that the giving of such instruction which included what was admitted in the other instruction, cured the error, as the instruction should be considered as a whole, and the one given correctly stated the law. Nowhere have we been able to find a criminal case where an erroneous instruction has been given that another instruction correctly stating the law, would cure that error. In the case of *the People vs. Scimeni* 316 Ill., 591 at 595, we find the following: "While an instruction which mis-states the law cannot be cured by another instruction given on the same trial which correctly states the law, an instruction which is merely incomplete can be supplemented by other instructions which are in harmony." It is our opinion that the Court erred in giving the defendant in error's instruction No. 20, and the error was not cured by the Court's given instruction No. 17, for plaintiff's in error.

The plaintiff in error strenuously insists that this judgment of conviction should not stand because it is based wholly upon the uncorroborated testimony of an accomplice, and in addition the

... ..

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[illegible]

accomplice has been shown to be a person who, "bears a bad reputation for truth and veracity, an ex-convict, a professional gambler and an admitted liar." An examination of the record in this case discloses that the witness, Rip Edwards, was guilty of all of the charges made by the plaintiff in error. In the case of *The People vs. Alward* 354 Ill., Page 357 at Page 361, the Court in discussing what credit should be given to the testimony of an accomplice, says: "The only evidence in the record tending to establish the charge against the plaintiff in error is that of Spicer and the statement of Reedy of a conversation had with plaintiff in error some months after the fire. Spicer had been convicted of a felony. He was in that class of persons whose testimony is legally discredited because of their conviction of an infamous crime. In addition to that he was by his testimony a self-confessed accomplice, whose evidence could be received and acted upon only with great caution. While such evidence was competent, and while a conviction may in a proper case be sustained on the uncorroborated testimony of an accomplice, the record in this case not only shows no material corroboration of Spicer's testimony, but he is discredited by numerous disinterested witnesses whose testimony is in nowise discredited or impeached. If their testimony is to be believed the testimony of Spicer could not be true. His testimony is shown to be utterly unworthy of belief. Where the credibility of an accomplice is so impeached as appears from this record, a conviction based solely upon such testimony cannot stand but should be and will be reversed. *People v. Hudson*, 341 Ill., 187; *People v. Ravenscroft*, 325 id. 225; *People v. O'Hara*, 332 id. 436; *People v. Harvey*, 321 id. 361; *People v. Pattin*, 290 id. 542."

[illegible]

The evidence further shows in this case that the accomplice, Rip Edwards, denied any and all guilt for a long time to both the officers and others, and continued to do so until after he had made demand upon the plaintiff in error for money, and had threatened that if Fahey did not come across with the money, that he would implicate him in the crime. This, Edwards freely admits, and we are sorry to say that the record also shows that the attorney appointed by the Court to represent Edwards, at the request of Edwards, also asked Fahey for money. In the case of *The People vs. Rendas* 365 Ill., at Page 399, the Court in discussing the weight to be given to the testimony of an accomplice, we find the following: "In weighing such testimony it is necessary to consider the influence under which it is given and whether the purpose of the witness is to shield himself from punishment, obtain some reward for himself or gratify his malice. For lack of material corroboration, or where the testimony of an accomplice is otherwise discredited, this court has not hesitated to reverse judgments of conviction." Whatever the motive of Edwards was in giving his testimony, from his own admissions, it shows it was given with the malicious intent to involve Fahey in this crime.

In addition to the testimony of the plaintiff in error denying any participation in the vote fraud as charged, fourteen reputable witnesses testified that Fahey's reputation for truth and veracity was good. In the case of *the People vs. Koloski* 309 Ill., 472, the Supreme Court discussed the rule in regard to reversing the judgment, as not warranted by the evidence, and uses this language: "We are not much inclined to reverse judgments of conviction in criminal cases on the ground that the conviction was not warranted by the evidence and do not do so when the evidence is

[illegible]

merely conflicting, but when there is such doubt from the proof as there is in this case, it is the duty of the court to reverse the judgment. (People v. Freeland, 284 Ill. 190; People v. McMahon, 254 id. 62; People v. Wallace, 279 id. 139; People v. Stoneking, 289 id. 308.) In addition to the doubtful character of the proof before referred to, nine witnesses (all the court permitted to be called on that question) testified to the good reputation of plaintiff in error for honesty and integrity. Among them were the cashier of a coal company, the village president, a doctor and two merchants. Proof of good character is not proof of innocence, but may be sufficient to raise a reasonable doubt when the other evidence is not of a satisfying character." In the Supreme Court in the case of The People vs. Minto 318 Ill., at Page 293, we find the following: "While the law has committed to the jury the determination of the weight and credit to be given the witnesses and authorizes a verdict of guilty when a consideration of all the credible evidence warrants the belief, beyond a reasonable doubt, that defendant is guilty, the law also makes it the duty of this court, in reviewing a judgment of conviction, to consider the evidence, and if the court believes the conviction is based upon unsatisfactory evidence, and there is a grave doubt of its sufficiency to establish guilt, the judgment should be reversed."

Owing to the unsatisfactory nature of the testimony of the witness, Rip Edwards, and the undisputed proof that his reputation for truth and veracity is bad, and the undisputed proof as to the bad character of said witness, and taking into consideration the fact that he has been contradicted in some respects by other witnesses, and corroborated only in minor matters by others, and also

the fact that fourteen witnesses testified that the defendant's reputation for truth and veracity was good, and that no effort was made to contradict this last testimony, we are of the opinion that the conviction in this case is based upon such unsatisfactory evidence, that the judgment should not stand, but be reversed.

For the giving of the instruction No. 20, and the unsatisfactory state of the evidence, the judgment of the Trial Court is reversed, and the cause remanded.

Reversed and the cause remanded.

the first time I happened to meet him in the
restaurant for lunch the evening was good, and I had a
good time. I was very much interested in his
the evolution in this case is based upon a comparison of
cases, that the present case is not only a new
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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 439

BE IT REMEMBERED, that afterwards, to-wit: On FEB 7 1951
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS
JANUARY 19, 1964

TO THE PRESIDENT, THE BOARD OF TRUSTEES, AND THE FACULTY

OF THE UNIVERSITY OF CHICAGO

FROM THE DEAN OF THE FACULTY

AND THE CHAIRMAN OF THE BOARD OF TRUSTEES

AND THE PRESIDENT OF THE UNIVERSITY

THE UNIVERSITY OF CHICAGO, CHICAGO, ILLINOIS, JANUARY 19, 1964

TO THE PRESIDENT, THE BOARD OF TRUSTEES, AND THE FACULTY
OF THE UNIVERSITY OF CHICAGO
FROM THE DEAN OF THE FACULTY
AND THE CHAIRMAN OF THE BOARD OF TRUSTEES
AND THE PRESIDENT OF THE UNIVERSITY

OCTOBER TERM, A.D. 1940.

Appeal from
Circuit Court,
Peoria County.

vs.

DECATUR CARRIAGE CO., a corporation,
and CECIL ROBERTS,
Defendants- Appellants.

Ignatius Leitner, as Administrator of the Estate of Raphael Leitner, deceased, brought a suit in the Circuit Court of Peoria County, against the Decatur Cartage Company, a corporation, and Cecil Roberts, claiming damages for the wrongful death of Raphael Leitner, as a result of an automobile collision occurring on Route No. 24, near Tuscarora Hill, Peoria County, Illinois, on December 24, 1938.

It is charged in the complaint of the plaintiff that Raphael Leitner, with all due care and caution for his own safety, was operating an automobile on a public highway, and the defendant, Decatur Cartage Company, through its agent and servant, Cecil Roberts, negligently and carelessly drove his car in such a manner, that it collided with that being driven by plaintiff's intestate and plaintiff's intestate was killed. The defendants filed an answer to the complaint in which they denied all allegations of negligence on their part, and claimed that it was through the

State of RANGLAND, 1909

and O'LOUGHLIN, ROBERT J.

• 6 •

negligence of the plaintiff's intestate, that the injuries occurred, which are complained of in plaintiff's petition. The case was tried before a jury who found the issues in favor of the plaintiff and assessed his damages at \$7,500.00. A motion was made for judgment notwithstanding the verdict, which was denied by the Court. Motions for a new trial and in arrest of judgment were filed and these likewise were overruled by the Court. Judgment was entered in the verdict in favor of the plaintiff and against the defendants for \$7,500.00. It is from this judgment that the appeal is prosecuted to this Court.

The appellant has assigned twenty reasons why the judgment of the trial court should be reversed, but we will consider only the tenth assignment, which is as follows: "Counsel for plaintiff made prejudicial, improper and inflammatory remarks during the course of the trial, and in the closing argument to the jury, and the defendants were prejudiced thereby." An examination of the record and especially the closing argument of the attorney for the plaintiff, discloses that in the course of the argument, several highly improper, prejudicial and inflammatory remarks were made. Objections were sustained by the Court to quite a number of these statements, but plaintiff's attorney insisted on proceeding in the same manner. Our Supreme and Appellate Courts have not hesitated to reverse judgments when by such argument the attorney has procured a judgment in such manner. What effect this inflammatory argument had upon the jury, no one can say, although the trial court properly sustained the objections. In the People vs. Chrfrikas 295 Ill., 229 the Court in a criminal case was discussing the improper argument of the State's

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Attorney to the jury. The Court struck out the argument and instructed the jury to disregard it. The Supreme Court in discussing this improper argument says: "The fact that the statement of the prosecutor was stricken out, on motion, after the Judge returned to the court room could not take from the minds of the jurors the effect of the speech anymore than the placing of a blotter upon an ink blot could remove entirely the effects of the blot of ink from a clean white sheet." In Bishop vs. Chicago Junction Railroad Company 289 Ill., at Page 63 at Page 70, we find the following: "While it is true that at times, in closely contested cases, counsel may inadvertently say that which is prejudicial, the influence of such a statement may generally be overcome by sustaining objections thereto and by retraction on the part of offending counsel made in good faith, yet where it would appear, as it does here by frequent instances, that counsel has in the presence of the jury indulged in acts and statements prejudicial to the rights of the opposite party, and which tend to indicate that he was seeking what might be gained from such prejudice of the jury, such misconduct will amount to a mistrial of the cause, unless it can be seen that it did not result in injury to the plaintiff in error. We cannot so hold here. The evidence was conflicting and the verdict returned was for a large sum. While it is unfortunate that this case must be reversed for these reasons, yet it is a misfortune visited upon defendant in error by his own attorney. When intelligent counsel persists in conduct which he knows may result in setting aside the verdict of the jury if he secure one, he is thereby deliberately taking chances with his client's rights. As was said in Bale v. Chicago Junction Railway Co. 259 Ill., 476, where prejudicial remarks were made, objected to and objection sustained: This kind of argument cannot be justified, and if willfully persisted in will justify the reversal

"While it is true that at present, in England, there is a feeling of
 may inadvertently say that which is prejudicial, but I believe
 such a statement may possibly be a source of misunderstanding and
 threats may be resented on the part of the Government and the
 good feeling, but what is really meant, as it may seem to be
 intentions, that I want to say in the present is that I am
 now and elsewhere, especially in the United States, I am
 and will continue to be in the United States, and I am
 from our position of the fact, that I am in the United States
 interest of the cause, and I am in the United States, and I am
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 sum. While it is true that this is a source of misunderstanding
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 the jury is a source of misunderstanding and I am
 with his efforts to do so. It is a source of misunderstanding
 railway on the 2nd of May, and I am in the United States, and I am
 objected to the railway, and I am in the United States, and I am
 is justified, and it is a source of misunderstanding and I am

of a judgment even though the court has sustained objections to it. It is, of itself, sufficient reason for granting a new trial."

In our opinion, the argument complained of in this case was highly prejudicial and used for the purpose of influencing the jury in favor of the plaintiff and against the defendant, and for that reason the judgment should be reversed.

One of the assignments of error by the appellant is that the verdict of the jury is against the manifest weight of the evidence. We do not pass upon this assignment of error, as the case will be reversed and remanded for another trial. The judgment of the Trial Court is hereby reversed, and the cause remanded.

Judgment reversed and cause remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

41637

CHICAGO TITLE AND TRUST COMPANY,
etc., et al.,

Appellees,

v.

WILLIAM BRINER, et al.,

Appellants.

INTERLOCUTORY APPEAL

FROM

SUPERIOR COURT, COOK COUNTY.

308 I.A. 440

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse an order entered by the Superior Court of Cook County December 10, 1940, appointing a receiver in a foreclosure suit and from an order entered December 23, 1940, denying defendants' motion to vacate the order.

The record discloses that April 25, 1940, plaintiffs filed their complaint in chancery to foreclose a mortgage securing bonds aggregating \$58,000 which became due and payable June 1, 1936. After the bonds were due, two forbearance agreements were entered into between the parties. By the terms of the first, plaintiffs agreed they would take no action until September 15, 1938, provided certain specified conditions were met. September 15, 1938, there was still due and unpaid a principal of \$58,000 and interest of \$13,790, and on that date a second forbearance agreement was entered into whereby plaintiffs agreed to accept interest at 4% instead of 6% and to forbear taking action until March 1, 1940, provided that from September 1, 1938, defendants would monthly pay \$550 which was to be applied on the reduced interest, current taxes and insurance premiums, the balance to be applied on the principal but no part was to be applied to the over-due interest; that pursuant to this agreement defendants made monthly payments and paid off \$1000 of the \$58,000 principal due and unpaid; that no part of the back interest of \$13,790, which was due November 15, 1936 had been paid; that there was now due and owing \$70,790, being \$67,000 principal and \$13,790 interest due November 15, 1936, except \$1,426.72, which was on deposit with plaintiffs.

It is further alleged in the verified complaint that the mortgaged property had greatly depreciated and the present market value

SHIRAZI TRUST, INC. TRUST COMPANY,
etc., et al.,

v.

WILLIAM SHIRAZI, et al.,

308 I.A. 440

by this special defendant's oath to testify on what appears
by the superior court of Cook County, December 10, 1940, regarding
reservoir in a lot of land with an alleged survey conducted in
1940, saying defendant's action in vacating the right.
The record shows that April 20, 1940, defendant filed
their complaint in Chicago in Chicago a mortgage recording book
aggregating \$25,000 which because has not been paid since 1940.
The bonds were due, the foreman's agreement was entered into
between the parties. By the terms of the first, plaintiff agreed
would take no action until January 1, 1941, provided certain condi-
tions were met. Defendant in 1940, plaintiff was still in
default a principal of \$25,000 and interest of \$1,750, and in 1941
date a second foreman's agreement was entered into whereby plaintiff
agreed to accept interest at 4% instead of 6% and in January 1,
1942, defendant would pay \$25,000 which was to be applied on the
reduced interest, principal taxes and insurance payments, the balance
to be applied on the principal but no part was to be applied to the
due interest; that payment for this extension agreement was made
payments and paid off the \$25,000 principal and was made;
that no part of the bond interest of \$1,750, which was the balance
in 1940 had been paid; that there was not due and owing \$2,750,
being \$27,000 principal and \$2,750 interest due November 15, 1942,
except \$1,425.75, which was on deposit with plaintiff.
It is further alleged in the verified complaint that the
foreclosed property had been illegally foreclosed and the proceeds thereof had

did not exceed \$40,000.

There was a hearing before the court on defendants' motion to vacate the order appointing the receiver and to discharge the receiver from which it appeared that there was a second mortgage of \$7000 and a third of \$13,000 on the property.

Shortly after the bill of complaint was filed in April, 1940, the owners of the equity filed a petition in the United States District Court of Illinois at Chicago which was afterward dismissed in December, 1940, and thereupon plaintiffs moved for the appointment of a receiver with the result as above stated. There were hearings on defendants' motion to discharge the receiver on December 13 and December 23, 1940. One of the defendants testified that he and his brother each occupied an apartment in the building which contained 18 apartments and three stores; that they realized \$800 each month from rents out of which they paid \$550 to plaintiffs under the forbearance agreements, the last of which expired in March, 1940; that a tenant of one of the apartments was a brother-in-law of the witness who testified, and he paid \$45 a month; that one of the stores was rented at \$50 a month and the tenant was \$1000 in arrears from May, 1940; that the owners of the equity had no property except their equity in the building in question.

A witness who was in the real estate business, called by plaintiffs, testified he had collected the rents for the receiver and that one of the tenants of the building showed him a receipt given by defendants whereby the witness was given credit of \$90 for November, December and a part of January for decorating a four-room apartment in which he lived. The evidence further showed that the RFC would loan \$31,000 on the property which the witness testified in his opinion was worth \$40,000.

The evidence is further to the effect that the apartment occupied by the brother-in-law, for which he paid \$45, was worth \$50 a month; that two of the owners of the equity occupied two apartments without rent.

did not exceed \$40,000.

There was a hearing before the court on defendant's motion to vacate the order appointing the receiver and to dissolve the receiver from which it appeared that there was a verbal agreement of \$7000 and a third of \$15,000 of the property.

Shortly after the bill of complaint was filed in court, the owners of the equity filed a petition in the United States

District Court of Illinois at Chicago which was returned December 1, 1940, and returned plaintiff's motion for the appointment of a receiver with the result as above stated. There were several

defendants' motion to discharge the receiver on December 1, and on December 25, 1940. One of the defendants testified that he and his brother

occupied an apartment in the building which contained 12 apartments and three stores; that they received \$1000 each month from rents and

which they paid \$500 to plaintiff's order the respondents testified the last of which expired in March, 1940; that a second of one of the

apartments was a brother-in-law of the witness who testified, and he paid 48 a month; that one of the stores was owned by the witness and

the tenant was \$1000 in arrears from May, 1940; that the witness testified had no property except their equity in the building in question

A witness who was in the real estate business, called by plaintiff, testified he had collected the rents for the building and that one of the tenants of the building owned also a second story

defendants whereby the witness was given details as to the business, December and a part of January the defendant's testimony was that

which he lived. The witness further stated that the witness lived \$31,000 on the property which the witness testified to the witness

was worth \$40,000.

The evidence is further to the effect that the defendant was

owned by the property-in-law, the witness testified that the witness was a month; that two of the owners of the equity received the property

without rent.

Without going into further details as to what the record discloses, we are clearly of opinion the court was warranted in appointing the receiver. The trust deed pledged the rents as security for the payment of the mortgaged indebtedness. Haugan v. Carr, 263 Ill. App. 333; Redington v. Craig, 270 Ill. App. 163; Frank v. Siegel, 263 Ill. App. 316; Chicago Title & Trust Co. v. Mack, 347 Ill. 480; Bagley v. Ill. Trust & Savings Bank, 199 Ill. 76.

But counsel for defendants say their action to discharge the receiver should have been allowed for the reason that they offered a bond with a surety company in lieu of the appointment of a receiver and par. 56, chap. 32, Ill. Rev. Stats. 1939 is relied upon. That the paragraph provides: "On an application for the appointment of a receiver, the court or judge may, in lieu of appointing a receiver, permit the party in possession to retain such possession upon giving bond with such penalty and with such security and upon such condition as the court or judge may order and approve; and the court may remove a receiver and restore the property to the possession of the party from whom it was taken upon the giving of a like bond." This statute does not make it mandatory on the chancellor to remove a receiver in such case but it is within his discretion in view of all the accompanying circumstances. Kelly v. Marks, 267 Ill. App. 199; Chicago Title & Trust Co. v. Hense, 296 Ill. App. 645 (abat.).

In the last case referred to we said: "when defendants requested the court to continue them in possession, offering to put up a bond as security, they virtually admitted the necessity that the court should take custody and possession of the premises. A similar condition appears in State Bank & Trust Co. v. Massion, 279 Ill. App. 234."

For the reasons stated the orders appealed from are affirmed.

ORDERS AFFIRMED.

Matchett, J., and McSurely, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 440²

BE IT REMEMBERED, that afterwards, to-wit: On FEB 11 1941
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

THE UNIVERSITY OF CHICAGO

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IN THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT.

OCTOBER TERM, A.D. 1940.

OTTO POHL, as Administrator of the
Estate of EVELYN POHL, Deceased,
Plaintiff-Appellee.

vs.

ADAM FAZZI,

Defendant-Appellant.

Appeal from
Circuit Court,
Winnebago County.

WOLFE, -- P. J.

This suit was brought by Otto Pohl, as Administrator of the Estate of his minor daughter, Evelyn Pohl. The complaint charges that the defendant, Adam Fazzi, negligently drove his automobile on a State Highway against the child, and caused her death. A trial before a jury resulted in a verdict and judgment for the plaintiff, in the amount of \$5,750.00. It is contended by the defendant that this judgment should be reversed, because it appears from the evidence, as a matter of law, that the decedent was guilty of contributory negligence; that, if there were no such contributory negligence, the judgment should be reversed, and the cause remanded for a new trial, because the record shows that there is reversible error in the giving and the refusing of instructions. It is also argued by the defendant that there is a variance between the allegations of the complaint and the proof. The objection of a variance was not made in the trial court, and the alleged variance not being of such a character as to defeat the suit, cannot be raised in this Court. (49 C. J. 826; 3 C. J.

ADMINISTRATIVE OFFICE OF THE JUDICIAL BRANCH
COUNTY OF LOS ANGELES

OUTSTANDING DEBTS

PLAINTIFF, as Administrator of the
Estate of WILLIAM POLI, deceased,
vs.
DEFENDANT - Plaintiff.

WILLIAM POLI, deceased.

This suit was brought by the plaintiff, as Administrator of the
estate of his minor daughter, WILLIAM POLI. The complaint alleges
that the defendant, ADAM POLI, negligently drove his automobile
on a State Highway against the plaintiff, and caused the death
of the plaintiff's daughter. A jury verdict in a previous trial
before a jury resulted in a verdict and judgment for the
plaintiff, in the amount of \$1,000.00. It is alleged by the
defendant that this judgment was reversed, and that the
evidence, as a matter of fact, does not support the finding
that the defendant was guilty of contributory negligence; that, if the
evidence is taken as a whole, the defendant is not negligent,
and the cause remained for a new trial. Because the evidence
that there is reversible error in the finding and judgment of
the jury is not sufficient to set aside the verdict, the court
instructed. It is the duty of the court to set aside the
verdict between the plaintiff and the defendant and the
The objection of a variance was not made in the trial court, and
the alleged variance was not a ground for reversal. It is
the suit, cannot be raised in this court. CAL. NO. 9575

796, Harris vs. Shebek 141 Ill., 287; Chicago Union Trac. Co., vs. Brethauer 223 Ill., 521.)

On June 19, 1937, Evelyn Pohl was a little past twelve years of age. She lived with her parents who resided east of State Highway No. 2, about one and one-half mile south of the southern limits of the City of Rockford. The district east of the highway, where her parents lived, is known as Indian Village Subdivision. A gravel road extending easterly from the highway toward the Pohl residence, is the southern boundary line of the subdivision. On the west shoulder of the paved highway, opposite the gravel road, there is a group of four mail boxes on posts of the usual height and construction. There were other mail boxes on the west side of the highway at various distances north of this group of mail boxes. The mail boxes were used by persons residing on both sides of the highway.

On June 19, 1937, before the accident, the defendant was driving his automobile northward on the east side of the black line marking the middle of the concrete pavement of the highway, toward the place where the collision occurred between the girl, and the defendant's car. The collision occurred on the east side of the pavement opposite the group of mail boxes and near the gravel road extending easterly along the south boundary line of Indian Village Subdivision.

In Indian Village Subdivision there were about eleven houses of which, "The Christianson house," stood near the highway, and immediately north of the gravel road. Other houses in the subdivision, except one, were not near the highway, and access to them from the highway was by another gravel road just north of the Christianson house. North of the latter road, there was a

dwelling forty to fifty feet east of the highway, known as the "Tanner house." On the east side of the highway, there were no houses north of the Tanner house for a distance of half a mile.

On the west side of the highway opposite the Tanner house, there was a building used as a store and filling station, which stood about thirty feet from the highway, and about 300 feet north of the group of mail boxes. To the west of this building and in the rear thereof, there were tourist cabins. There were several houses, which stood some distance back from the highway, south of the mail boxes.

On June 19, 1937, at approximately 9:30 in the morning, Evelyn Pohl was near the group of mail boxes. There is no evidence in the record that defendant knew Evelyn Pohl, or where she lived, or that persons residing on the east side of the highway, crossed the highway to use the mail boxes on the west side of the highway. The group of four mail boxes stood seven and one-half feet from the edge of the paved part of the highway in a corner formed by the highway, and a road leading to houses west of the highway.

As the defendant drove his car toward the north, Evelyn Pohl was near the four mail boxes on the west side of the highway. Two men were riding in an automobile being driven on the west side of the pavement and approaching the place in the highway opposite the mail boxes. They were eye-witnesses to the accident, and they testified to facts and circumstances of the collision. The defendant was not permitted to testify, as he was an incompetent witness under the Evidence Act.

The two witnesses who saw the accident, testified substantially as follows: That they first saw Evelyn Pohl standing near

dwelling house to fifty feet east of the highway, across the
 "Tanner house." In the east side of the highway, there was an
 house north of the Tanner house, the distance of which was
 On the east side of the highway, there was a building which
 stood about thirty feet from the highway, and about the same
 of the group of mill houses. The two rows of mill houses were
 the rear houses, there were the front houses. There were several
 houses, which stood some distance from the highway. The mill
 The mill houses.
 On June 19, 1937, at approximately 2:00 in the afternoon,
 Twelve men were seen the group of mill houses. There were
 in the group that defendant knew several men, the names of which
 or that person residing on the east side of the highway, located
 the group to see the mill houses on the east side of the highway.
 The group of four mill houses were located on the east side of
 the edge of the road, and the highway, and a road leading to the mill houses.
 As the defendant drove his car toward the mill houses,
 Four men were seen the four mill houses on the east side of the highway.
 The men were riding in the car, and the defendant saw them as
 of the pavement and approaching the mill houses on the east side of the highway.
 The mill houses. They were located on the east side of the highway,
 located to the east and the defendant saw them as he drove toward
 that was not possible to identify, and the defendant saw them as
 under the Evidence Act.
 The two witnesses who saw the defendant, and the defendant's
 fully as follows: That they were the mill houses on the east side of the highway.

the four mail boxes when they were about 350 feet north of the boxes; that she looked toward them, as they were approaching her; that their car was then travelling at a speed of about forty miles an hour, and that the girl started to walk toward the middle of the highway; that the driver of the car took his foot from the accelerator, and let the car move on its own momentum, and that they were sixty to eighty feet from her, as she passed in front of their car on the west side of the pavement; that the driver turned his car toward the west, but not off of the pavement, before his car passed the girl; that Evelyn walked to the middle of the pavement and stopped; she then looked toward the south, from which direction the automobile of the defendant was then approaching; that the car of the defendant was then estimated by witnesses, to be about sixty or seventy to eighty feet from the girl, and at that moment the defendant swerved his car toward the east, and the girl ran toward the east side of the highway; that the girl and the car of the defendant collided, as the two cars passed on the highway; that the driver of the car, going south, did not see the impact of the car and the girl.

The passenger in the south-bound car testified that, "Apparently the front fender of the car struck her and she hit the hood and windshield, and maybe her body hit the glass; would seem as though she went up to the corner of the windshield. We were very close to her at that time. I looked out of the back window, and I saw her through the back, that is, fall to the ground. She fell close to the shoulder. The defendant's right wheels were both off of the cement,--it was angling off at that time. I saw the girl lying near the cement on the shoulder right alongside of the cement."

The evidence shows that the collision happened when the girl was about two feet west from the east edge of the pavement, and approximately opposite the four mail boxes standing on the west side of the highway. The girl, by the impact of the car, was thrown into the air, and killed. She was picked up on the easterly edge of the pavement just south of the gravel road leading to the Pohl residence, and on the northerly line of the plowed field south of this gravel road.

On the date of the accident, the pavement was dry, the weather clear, and the view in both directions from the group of mail boxes unobstructed for a distance of half of a mile. The complaint charges general negligence in the operation of the car by the defendant, and specifically, that the defendant drove his car at a high and dangerous rate of speed just before the accident.

The eye-witnesses estimated the speed of the defendant's car at forty to fifty miles per hour when they saw it some distance south of the place of the collision. Both witnesses testified they were not able to judge definitely, the speed of the car approaching them. One of these witnesses testified that he did not hear a horn sounded before the accident and the other, that he did not recall hearing the sound of a horn at that time.

After the collision, the defendant's car went in a north-easterly direction, until it struck a telephone pole from fifteen to eighteen inches in diameter. The impact of the car, against the pole, broke the front bumper of the defendant's car, and crushed the grille in front of its radiator. The telephone pole was pushed toward the north at the surface of the ground about eighteen inches. It was split and crushed, but remained standing and stopped the car.

After the accident, witnesses saw tire marks on the east side of the pavement, and south of the place of the collision, which marks lead to, and connected with tire marks on the shoulder of the highway, and thence, across the gravel road (leading to the Pohl residence) up to the telephone pole. Testimony was introduced giving distances in feet between various points and objects along the highway, and the length of the tire marks. The distance from the south line of Indian Village Subdivision, being the south line of the road leading to the Pohl residence, to a point north and opposite the place where the group of mail boxes were, is eighteen feet; the distance from the south line of the subdivision to the place where the defendant's car left the pavement is, 63 feet; the testimony was that the tire marks on the pavement, extended north and south on the pavement from thirty-six to thirty-nine feet.

It appears from the evidence what the defendant applied the brakes of his car at a distance of about 120 feet south of the place of the collision. Whether he turned his car toward the east when the girl looked toward his car, as the witnesses testified, at a greater distance than 120 feet, does not appear in the testimony, nor can it be ascertained from the evidence how far the defendant's car was from the girl when she stepped away from the mail boxes onto the west side of the concrete pavement.

In the case of *Graham v. Hagmann*, 270 Ill., 252, it is stated: "There is no imperative duty resting upon pedestrians or upon travellers in a horse drawn vehicle on public highways to keep a continuous lookout for automobiles, under penalty that if they fail to do so and are injured, contributory negligence will be conclusively imputed to them. (*Millsaps v. Brogdon*, 97 Ark. 469.)" The duty resting upon a pedestrian on a public highway to

After the accident, witnesses saw the car on the left
side of the pavement, and a wheel on the left of the pavement,
which turned left 60, and continued along the road as the car
of the highway, and there, during the travel, the car
the left wheel (up to the reference line). The car was
introduced giving evidence in 1935 between various points of
objects shown was different, and the location of the car
The distance from the point of the car to the reference line
being the south line of the road leading to the car, the distance
to a point north and opposite the car where the car was
boxes were, is eighteen feet; the distance from the car to the
of the car to the point where the car was, is
the pavement is, 6 feet; the testimony was that the car was
on the pavement, extended north one foot on the pavement
thirty-six to thirty-nine feet.

It is noted from the witness that the testimony related was
prayer of his car at a distance of about 100 feet away from the
place of the collision. The car was turned off the road and
east when the car first looked toward the car, as the car was
fired, at a greater distance from the car, but the car was
testimony, nor can it be established that the car was
the defendant's car was from the left side of the road
the car turned onto the west side of the road, as the car
In the case of the car, the car was, the car was, the car was
stated: "There is no testimony that the car was, the car was,
upon travelers in a corner, the car was, the car was,
keep a continuous line of the car, the car was, the car was,
they fall to the car, the car was, the car was,
be conclusively established that the car was, the car was,
App.)" The dog testified that the car was, the car was,

be watchful for the approach of automobiles to prevent injury from them, is no greater than the duty resting upon the driver of automobiles to be watchful for such pedestrian, in order to prevent injury to him. The duty of each in the premises is reciprocal. *Graham v. Hagmann*, supra, and *Blumb v. Getz*, 366 Ill. 273. The question of due care on the part of the plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased. *Thomas v. Buchanan*, 357 Ill. 270; *Blumb v. Getz*, supra.

At the time of the accident, the Statute required that the rate of speed of an automobile, such as was then and there being driven by the defendant, must not be greater than is reasonable and proper, having regard to the traffic, and use made of the highway, or so as to endanger the life or limb or property of any person.

There are facts and circumstances appearing in the evidence, including legitimate inferences reasonably and legally to be drawn therefrom, according to the evidence most favorable to the plaintiff's intestate, which might tend to show negligence on the part of the defendant in the operation of his car at an unreasonable rate of speed while driving his car toward the place where the collision occurred, regardless of the presence of the girl on the highway, or any part thereof. As is stated in the case of *Blumb v. Getz*, supra, at page 276: "In considering the question of due care on the part of the plaintiff's intestate, it is well

to remember that this cannot always be shown by direct proof, but that the evidence as adduced by the plaintiff, should disclose facts from which it may reasonably be inferred that the plaintiff's intestate was in the exercise of due care. It was not negligence per se for the deceased, a pedestrian, to be upon the highway. As a matter of common knowledge, pedestrians upon highways running through the country use, and have a right to use, such highways, as well as the autoist, and both hold a mutual obligation, each to the other, to observe their reciprocal rights. The jury might take into consideration in its deliberations the fact, if it was a fact, that the pedestrian may have observed the coming automobile, and believed that if it observed the speed law, he would have ample opportunity, with safety, to step into the highway for the purpose of retrieving the glove which he had dropped. If the automobile was far enough away at the time, to have justified a person in the exercise of ordinary care, to have acted as the plaintiff did, it would not necessarily indicate such lack of care on the part of the plaintiff, as would amount, in law, to negligence." We have arrived at the conclusion that the plaintiff's intestate was not guilty of contributory negligence, as a matter of law. (Blumb v. Getz, *supra*; Graham v. Hagmann, *supra*; Kessler v. Washburn, 157 Ill. App. 532, Grubb v. Illinois Terminal Co., 365 Ill. 530.)

The defendant urges that there is reversible error in eight instructions given on behalf of the plaintiff, and specific objections are pointed out to each instruction. One objection is,

that as some of the instructions state abstract propositions of law, and do not apply the law to the case on trial by the terms of the instructions, the giving of such instructions is reversible error. The objection is a valid one if the instruction given has a tendency to mislead the jury. (Parnelle v. Wheelock, 224 Ill. 194.) The instructions, so criticized by the defendant, are applicable to the facts appearing in the evidence in this case. Each one of them states the respective rights of pedestrians and motorists on the public highways, and when read together, with the other instructions given, they are not confusing, nor tended to mislead the jury. It is also contended by the defendant that one instruction given, does not correctly state and define the material allegations of the complaint, and the answer thereto. This objection we do not consider of such a serious nature as to warrant a reversal of the case.

The appellant seriously contends that instruction No. 2--16 given on behalf of the plaintiff, is erroneous, and for this reason alone, the case should be reversed and remanded for a new trial. He first insists that the complaint does not charge the defendant with failing to blow a horn, and therefore the instructions should not have been given. An examination of the complaint discloses that it charges the defendant with general negligence, and we think, under this charge, the objection to the instruction is not well founded. Our Courts have criticized such instructions, but considered with the other given instructions in the case, we do not see how the jury could be misled by this instruction.

Defendant also objects to an instruction given at the request of the plaintiff which, in effect, told the jury that

it was the duty of the defendant, when he became aware of the presence of the girl on the highway, to use reasonable care to stop his automobile to avoid injury of Evelyn Pohl, if he could. There was given, at the request of the defendant, an instruction stating fully the defendant's theory of the duty resting on the defendant to stop his automobile in order to avoid injury to Evelyn Pohl. We have carefully considered defendant's objection to the instruction given for the plaintiff, and the law pertaining to a duty of a motorist to lessen the speed of his car, or stop it to avoid injury to a pedestrian on the highway. We have arrived at the conclusion that any error, if any, in the instruction given for the plaintiff was cured by the instruction given at the request of the defendant.

The jury, by their verdict, have found the issues in favor of the plaintiff. We cannot say that their finding is against the manifest weight of the evidence. We find no reversible error in the case. The judgment of the Trial Court is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in the year of our Lord one thousand nine hundred and forty-one, within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 441'

BE IT REMEMBERED, that afterwards, to-wit: On FEB 11 1941 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY
540 SOUTH EAST ASIAN BUILDING
CHICAGO, ILLINOIS 60607-7070
TEL: 773-936-5000 FAX: 773-936-5001

DR. J. K. STILLE
1100 SOUTH EAST ASIAN BUILDING
CHICAGO, ILLINOIS 60607-7070
TEL: 773-936-5000 FAX: 773-936-5001

DR. J. K. STILLE
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IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, 1940

MARGARET TARVIN, ADMINISTRATRIX
OF THE ESTATE OF MUREL TARVIN,
DECEASED,

Appellee,

vs.

GEORGE ENNEN,

Appellant.

APPEAL FROM THE CIRCUIT
COURT OF IROQUOIS COUNTY.

HUFFMAN, J.

This is an appeal from a judgment entered by the Circuit Court of Iroquois County on May 31, 1940, reviving a judgment entered in such court on April 18, 1932, whereby appellee recovered judgment against appellant in the sum of \$1760. That judgment is referred to as case No. 22,427. On July 18, 1930, appellant took judgment by confession against appellee in the sum of \$745.88. This case was designated as No. 22,227. On November 25, 1930, appellant obtained judgment against appellee for possession of certain premises in a forcible entry and detainer suit. On May 26, 1933, appellee's judgment against appellant was credited with the sum of \$1149.03. On the same date the judgment by confession which appellant had taken against appellee on July 18, 1930, in the sum of \$745.88 was satisfied and released, and on the same date appellant acknowledged receipt from appellee of the sum of \$217.50 in full for all rents due under a lease between them, or otherwise.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

WILLIAM T. HUTCHMAN, JR.,
Plaintiff,
vs.
GEORGE H. HUTCHMAN, JR.,
Defendant.

WILLIAM T. HUTCHMAN, JR.,
Plaintiff,
vs.
GEORGE H. HUTCHMAN, JR.,
Defendant.

HUTCHMAN, J.

This is an appeal from a judgment entered by the District Court of the District of Columbia on May 31, 1940, reversing a judgment entered in such court on April 15, 1939, whereby appellant was covered judgment against respondent in the sum of \$1,000.00. Judgment is returned to the case No. 100-100000-100. On May 10, 1940, appellant took judgment by confession against respondent in the sum of \$1,000.00. This case was designated as No. 100-100000-100. On November 25, 1939, appellant obtained judgment against respondent for possession of certain premises in the District of Columbia. On May 10, 1940, appellant's judgment was reversed and appellant was credited with the sum of \$1,000.00. On the same date the judgment by confession against respondent was reversed and appellant was credited with the sum of \$1,000.00. On May 10, 1940, appellant was satisfied and released, and on the same date appellant received receipt from respondent of the sum of \$1,000.00. On May 10, 1940, all rents due under a lease between the parties were paid.

Appellant answered the complaint of appellee to revive the judgment, alleging a complete satisfaction thereof on May 26, 1933. Appellant also filed a counter-claim in the sum of \$1800, alleged to be due for rentals under a lease between them and out of which the difficulties herein arose. It is the position of appellant that on May 26, 1933, he had sufficient claims against appellee, including rentals due under the lease and open accounts for merchandise, which with his confessed judgment for \$745.88, were sufficient to satisfy appellee's judgment of \$1760. against him, in full; and that it was with this understanding that he satisfied his aforesaid judgment of \$745.88 and issued his receipt in the sum of \$217.50 in satisfaction of his other claims. Appellant urges that his attorneys had no authority from him to make the adjustment of accounts between him and appellee as was done on May 26, 1933.

The matters in dispute between the parties in this case were purely questions of fact in regard to what transpired on May 26, 1933, with respect to the adjustment of claims between them.

The trial court determined these questions of fact and we are not disposed to disturb the judgment.

Judgment Affirmed.

Appellant showed no intention of making a return
the judgment, which is a matter of public record.
May 26, 1933. Appellant also filed a counter-claim in the
sum of \$1000, which he claimed was due to him for services rendered
between then and out of which the defendant had received money.
It is the position of appellant that on May 26, 1933, he
had sufficient claims against defendant, including counter-claims
and under the facts and upon grounds for enforcement, which
with his original judgment for \$17,500, were sufficient to
satisfy appellant's judgment of \$1000. He claims that, in 1931,
and that it was with this understanding that he executed
his promissory note for \$17,500 and issued his receipt for
the sum of \$17,500 in satisfaction of his other claims.
Appellant claims that his affidavit was an authority from
him to make the adjustment of accounts between him and
appellee as was the case on May 26, 1933.
The matter is dispute between the parties in this
case were purely questions of fact in regard to such trans-
acted on May 26, 1933, with respect to the adjustment of
claims between them.
The trials court determined these questions of fact and
we are not disposed to disturb the judgment.

Witness: Affirm...

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court



41427

GERALD GRANT and ROBERT L. GRANT,
doing business as GRANT'S ART
GALLERIES,

Appellees,

v.

CHICAGO HAIR GOODS COMPANY, a
Corporation (MORRIS L. GOLDSTEIN),
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

308 I.A. 441²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, the landlords, brought suit against defendant to recover \$4,164.55 claimed to be due under the terms of a written lease entered into between the parties February 26, 1932, and other items which they claimed to be due by reason of defendant's occupancy of the premises 25-27 S. Wabash avenue, Chicago. Defendant denied liability; there was a trial before the court without a jury, a finding and judgment in plaintiffs' favor for \$3,639.55, and defendant appeals.

The record discloses that February 26, 1932, the parties entered into a written lease whereby the entire third floor of the six-story building known as 25-27 S. Wabash avenue, Chicago, was let to defendant for a period of seven years - from May 1, 1932 to April 30, 1939. The premises were to be occupied "for sale, manufacture and stock room for Hair Goods, beauty culture supplies, and beauty culture furniture and equipment." The monthly rental was \$250 in 1932, and increased until from May, 1935 until the end of the term the monthly rental was \$291.90. Defendant entered into possession of the premises and occupied them until he vacated May 1, 1938, as defendant contends, but plaintiffs say defendant did not vacate the premises until about the middle of June, 1938. Rent was paid to May 1, 1938. Plaintiffs' claim as found by the court is for rent for twelve months at \$291.90, less \$485.63, which plaintiffs collected from a subsequent tenant for the months of February, March, and April, 1939. The other items of plaintiffs' claim are for electric current, \$119.38; meter rental, \$20; removal of rubbish, \$8; removal of sign,

GERALD GRANT and ROBERT L. GRANT
doing business as GALLERY ART
GALLERIES

Appellees,

v.

CHICAGO HAIR GOODS COMPANY, a
Corporation (MORRIS L. GOLDSTEIN),
Appellant.

MUNICIPAL COURT
OF CHICAGO

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, the landlords, brought suit against defendant
to recover \$4,184.55 claimed to be due under the terms of a written lease
entered into between the parties February 28, 1932, and other items
which they claimed to be due by reason of defendant's occupancy of the
premises 25-27 S. Wabash Avenue, Chicago. Defendant denied liability
there was a trial before the court without a jury, a finding and
judgment in plaintiffs' favor for \$3,639.55, and defendant appeals.
The record discloses that February 28, 1932, the parties
entered into a written lease whereby the entire third floor of the
six-story building known as 25-27 S. Wabash Avenue, Chicago, was let
to defendant for a period of seven years - from May 1, 1931 to April
30, 1939. The premises were to be occupied "for sale, manufacture
and stock room for hair goods, beauty culture supplies, and beauty
culture furniture and equipment." The monthly rental was \$50 in
1932, and increased until from May, 1935 until the end of the term
the monthly rental was \$201.90. Defendant entered into possession of
the premises and occupied them until he vacated May 1, 1938, as he
contends, but plaintiffs say defendant did not vacate the
premises until about the middle of June, 1938. Rent was paid to May
1, 1938. Plaintiffs' claim as found by the court is for rent for
twelve months at \$201.90, less \$45.65, which plaintiffs collected
from a subsequent tenant for the months of February, March, and April,
1939. The other items of plaintiffs' claim are for electric current,
\$119.38; meter rental, 75¢; removal of rubbish, 25¢; removal of glass,

\$25; and attorney's fees, \$450, making a total of \$3,639.55.

Defendant's position is that (1) he was compelled to vacate the premises for the reason that plaintiffs rented the fourth floor of the building and at other times the fifth floor to one who conducted a gambling place - operated a "bookie" where there was betting on horse races; that on account of this crowds gathered in the building; that the place was frequently raided by the police; that defendant's business was injured and he was compelled to move next door where he rented property at 29 S. Wabash avenue, and (2) that when defendant complained to plaintiffs about the gambling and interference with defendant's business, plaintiffs told defendant he could move, which he did and therefore he was not liable.

On the other side plaintiffs contention is that defendant knew that for many years there was a tenant in the building who carried on gambling - betting on horse races; that he made no objections; that plaintiffs did not tell defendant he could vacate the premises. And their position further is that defendant rented a place next door because he wanted to be relieved of the liability of the lease.

The trial was started before Judge Rooney and a number of witnesses gave testimony to the effect that they were customers of defendant, Goldstein, and had difficulty in transacting their business with him because of the crowds in the entrance of the building and in the one elevator which afforded access to defendant's premises, and of the raids by the police. After other evidence was introduced, the case was continued and transferred to Judge Padden where it was stipulated that the evidence heard by Judge Rooney should be written up, the balance of the evidence heard by Judge Padden and he was to consider the evidence theretofore taken before Judge Rooney. A number of witnesses testified before Judge Padden, including plaintiffs and defendant.

\$25; and attorney's fees, \$450, making a total of \$575.00.

Defendant's position is that (1) he was compelled to vacate the premises for the reason that Plaintiff rented the fourth floor of the building and at other times the fifth floor to one who conducted a gambling place - operated a "bookie" where there was betting on horse races; that on account of this crowd gathered in the building that the place was frequently raided by the police; that defendant's business was injured and he was compelled to move next door where he rented property at 28 W. Kansas Avenue, and (2) that when defendant complained to Plaintiff about the gambling and interference with defendant's business, Plaintiff told defendant he could move, which he did and therefore he was not liable.

On the other side Plaintiff contends that defendant knew that for many years there was a tenant in the building who carried on gambling - betting on horse races; that he made no objection; that Plaintiff did not tell defendant he could vacate the premises. And their position further is that defendant rented a place next door because he wanted to be relieved of the liability of the lease.

The trial was started before Judge Rooney and a number of witnesses gave testimony to the effect that they had spoken to defendant, Goldstein, and had difficulty in procuring their business with him because of the crowds in the entrance of the building and the one elevator which afforded access to defendant's premises, and the raids by the police. After other evidence was introduced, the case was continued and transferred to Judge Becker where it was stipulated that the evidence heard by Judge Rooney would be admitted up, the balance of the evidence heard by Judge Becker and he was to consider the evidence transferred taken before Judge Rooney. A number of witnesses testified before Judge Becker, including Plaintiff and defendant.

Defendant contends he was constructively evicted because of the gambling carried on in the premises which is a public nuisance; that there were frequent raids by police - 34 raids and 85 arrests from January 1, 1937 to June 6, 1938; that his business was seriously affected and that under the law he was entitled to vacate the premises. A number of authorities are cited and discussed to sustain his contention.

On the other hand plaintiffs contend there was no constructive eviction even though gambling was carried on in the premises. Counsel says, "The 'bookie' gambling establishment, even though it be an illegal enterprise, does not necessarily of itself constitute a constructive eviction." And, "Whether the acts of the landlord amount to a constructive eviction is a question of fact."

Under defendant's evidence, standing alone, we think the court might well have held that the gambling conducted on the fourth and fifth floors of the building, the crowding of the elevator and the raiding of the place by the police, authorized defendant to vacate the premises on the ground he was constructively evicted. But there is other evidence that defendant knew the gambling was carried on for about four years before he vacated the premises, made no objection to it and that he left the premises not on account of the gambling or other matters of which he now complains, but because he desired to move,

The question whether defendant was constructively evicted was one of fact. Barrett v. Boddie, 158 Ill. 479; Gibbons v. Hoefeld, 299 Ill. 455; Auto Supply Co. v. Scene-in-Action Corp., 340 Ill. 196. Judge Padden, who decided the case, saw and heard the witnesses whose testimony on the question would be of controlling importance. He found in favor of plaintiffs, and upon a consideration of all the evidence in the record we are unable to say his finding is against the manifest weight of the evidence. In these circumstances we are not warranted in disturbing the finding and judgment.

Defendant contends he was constructively evicted because the gambling carried on in the premises which is a public nuisance; that there were frequent raids by police - 54 raids and 88 arrests from January 1, 1937 to June 3, 1938; that his business was seriously affected and that under the law he was entitled to vacate the premises. A number of authorities are cited and discussed to sustain his contention.

On the other hand plaintiff contends there was no constructive eviction even though gambling was carried on in the premises. Counsel says, "The 'bookie' gambling establishment, even though it is an illegal enterprise, does not necessarily of itself constitute a constructive eviction." And, "Whether the acts of the landlord and to a constructive eviction is a question of fact."

Under defendant's evidence, standing alone, we think the court might well have held that the gambling conducted on the fourth and fifth floors of the building, the crowding of the elevator and the raiding of the place by the police, authorized defendant to vacate the premises on the ground he was constructively evicted. But there is other evidence that defendant knew the gambling was carried on for about four years before he vacated the premises, made no objection to it and that he left the premises not on account of the gambling or other matters of which he now complains, but because he desired to move.

The question whether defendant was constructively evicted was one of fact. Baxter v. Rohde, 188 Ill. 475; Hipbone v. Hall, 239 Ill. 453; Auto Supply Co. v. Cooper-Hudson Corp., 340 Ill. 100. Judge Padden, who decided the case, was under the mistaken impression that the question would be of controlling importance. He found in favor of plaintiff, and upon a consideration of all the evidence in the record we are unable to say his finding is against the manifest weight of the evidence. In these circumstances we are

But counsel for defendant say Judge Padden had no more opportunity to determine the truth of the testimony than has this court because a great many of the witnesses did not appear before him but testified before Judge Rooney. While most of the witnesses did testify before Judge Rooney, yet we think the witnesses who gave the vital testimony in the case appeared before Judge Padden. The evidence is in direct conflict, defendant testifying that when he complained to plaintiffs about the gambling and stated he desired to move, they told him he might do so, while plaintiffs' evidence is that no complaint was made and nothing was said about defendant vacating the premises until after defendant had signed a lease January 18, 1938 for the premises next door.

We think whether there was a surrender of the lease with the consent of the landlord was also a question of fact for the trial judge. He found in favor of plaintiffs and we are unable to say his finding is against the manifest weight of the evidence.

Defendant further contends it was the duty of the landlord to mitigate damages for the unexpired term of the lease; that "The plaintiffs were derelict in their duty in this regard, and moreover took possession of the premises and excluded the defendant." A number of authorities are cited and discussed on both sides on the question whether it is the duty of the landlord, where the premises are vacated before the term covered by the lease has expired, to use reasonable diligence to procure another tenant and mitigate the damages. The decisions are conflicting but we think the question is not involved in the instant case because the lease in question expressly provided that if the lease was terminated in any way the premises "may, but need not, be re-let by Lessor," for such rent and upon such terms and for such period or periods as may seem fit to the Lessor, but that the Lessor shall not be required "to do any act whatsoever or exercise any diligence whatsoever in or about the procuring of another occupant or

But counsel for defendant say they had had no more opportunity to determine the truth of the testimony than has this court because a great many of the witnesses did not appear before him but testified before Judge Rooney. While most of the witnesses testified before Judge Rooney, yet we think the witnesses who gave the vital testimony in the case appeared before Judge Redden. The evidence is in direct conflict, defendant testifying that when he complained to plaintiffs about the gambling, and stated he desired to move, they told him he might do so, while plaintiffs' evidence is that no complaint was made and nothing was said about defendant vacating the premises until after defendant had signed a lease January 13, 1917 for the premises next door.

We think whether there was a surrender of the lease with the consent of the landlord was also a question of fact for the trial judge. We found in favor of plaintiffs and we are unable to say our finding is against the manifest weight of the evidence.

Defendant further contends it was the duty of the landlord to mitigate damages for the unexpired term of the lease; that "the plaintiffs were derelict in their duty in this regard, and moreover took possession of the premises and excluded the defendant." A number of authorities are cited and discussed on both sides on the question whether it is the duty of the landlord, where the premises are leased before the term covered by the lease has expired, to use reasonable diligence to procure another tenant and mitigate the damages. The citations are conflicting but we think the question is not involved in the instant case because the lease in question expressly provided that if the lease was terminated in any way the premises "shall and need not be re-let by lessor," for such rent and upon such terms and for such period or periods as may seem fit to the lessor, but that the lessor shall not be required "to in any way recover or exercise any diligence whatever in or about the procuring of another occupant or

tenant to mitigate the damages of Lessee or otherwise, Lessee hereby waiving the use of any care or diligence by Lessor in the re-letting thereof."

We are further of opinion the evidence is insufficient to warrant us in disturbing the finding and judgment of the trial court on the ground that plaintiffs took possession of the premises and excluded defendant therefrom.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J., concur.

tenant to mitigate the damages of lessee or otherwise, leaving the
waiving the use of any care or diligence by lessee in the relation
thereof."

We are further of opinion the evidence is insufficient to
warrant us in disturbing the finding and judgment of the trial court
on the ground that plaintiff took possession of the premises and
included defendant therefrom.

The judgment of the municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Mathews, J., and McSweeney, J., concur.

41467

THOMAS A. SHERIDAN,

Appellant,

v.

DR. LOUIS L. FIORITO,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

308 I.A. 442

Plaintiff brought suit claiming that he was injured by the negligent conduct of defendant in handling his automobile; upon trial by a jury the verdict was for defendant, and plaintiff appeals, claiming first that the verdict is contrary to the weight of the evidence.

Plaintiff was a police sergeant in the motorcycle division of the traffic police department of Chicago; at about 5 o'clock in the evening of October 30, 1937 he was riding his motorcycle west on Harrison street, on which there are street car tracks; he was following a truck which, plaintiff testified, had passed a street car on its left in violation of the rules, and he was following it for the purpose of telling the driver to pull over to the north curb; as they approached Pulaski road, which runs north and south, the red light was against Harrison street traffic, and west bound traffic on Harrison was moving very slowly approaching the red light. Plaintiff was traveling at about 5 miles an hour, and when he had reached a point about even with the center of defendant's automobile, which was parked at the north curb, it pulled out from the curb towards plaintiff, who turned towards the southwest in order to avoid being struck, but defendant's automobile struck his motorcycle in the rear, throwing it over to the left and pinning him beneath it seriously injuring his left leg. Plaintiff testified that he felt the impact between the automobile and his motorcycle, and the rear mudguard was bent.

Joseph Surwill, a police officer for the city, testified he was at the northwest corner of Harrison and Crawford (now called Pulaski road); that he heard a crash and saw a motorcycle lying on

41487

THOMAS A. HARRISON

v.

DR. LOUIS H. BROWNE

Plaintiff

Defendant

THE COURT

MR. JUSTICE SAMUEL JOHNSON

308 T.A. 448

Plaintiff moved that defendant be ordered to pay the costs of this

negligent conduct of defendant in causing his automobile to be run
by a jury the verdict was for defendant, and plaintiff recovered, and
the first that the verdict is contrary to the finding of the jury
Plaintiff was a police officer in the Milwaukee Police

of the Traffic Police Department of Chicago; at about 1 o'clock in
the evening of October 20, 1907 he was riding his motorcycle west on
Harrison street, on which there are street cars running; he was riding
in a truck which, plaintiff testified, was being driven by one
its left in violation of the rules, and he was following it for the
purpose of telling the driver to pull over to the curb and stop
approached Pulaski road, where upon he saw the car, and saw light
was against Harrison street traffic, and that when plaintiff was

Harrison was moving very slowly and was in the two lanes, plaintiff
was traveling at about 3 miles an hour, and when he had reached a
point about even with the corner of defendant's automobile, plaintiff
turned at the north curb, it pulled out from the north corner place
left, who turned towards the south-west in order to reach the south
but defendant's automobile started off immediately in the same place
it over to the left and ploughed and plaintiff is not sure whether it
left left. Plaintiff testified that he fell the car was moving west
automobile and his motorcycle, and that immediately after that

Joseph Kowalski, a police officer for the city, testified
was at the northeast corner of Milwaukee and Harrison (now called
Pulaski road); that he heard a scream and saw a motorcycle lying on

plaintiff, who was between the two rails of the west bound track; defendant's automobile was at an angle to the curb, facing southwest, and its left front wheel was just about on the north track of the west bound rails; that defendant got out of his car and said, "Well, I couldn't help it, I did not see it."

John Stach, another police officer, was with officer Surwill, heard the impact and ran to the scene; Stach thought the motorcycle had run into the rear of the truck and went back to the scene with the truck driver but plaintiff told him the truck had nothing to do with the accident and the truck driver left.

Manuel Stuber, a repair machinist for the city, testified that plaintiff's motorcycle was brought in for repairs; that the rear fender was pushed up close to the rear wheel on the right side and the foot starter crank on the left side was broken off; he said the rear fender goes over the top of the tires and about 4 inches down over the sides; that this fender was bent at the rear wheel on the right side.

Defendant, a physician, testified that when he got into his car and started the motor he looked over his left shoulder and simultaneously turned his wheels; that he heard the "chugging" of the motorcycle and moved his auto to the left and forward; that after the accident he stopped his car and got out and helped to bring plaintiff to his office nearby; he found that the leg was injured but felt that "It was embarrassing that this thing should happen so I asked him to get his own doctor." The witness further testified that as the motorcycle passed his auto he heard it but did not see it, and in answer to the question whether there was any impact between the motorcycle and his car, replied, "I don't remember."

In count 2 of plaintiff's complaint, chapter 95-1/2 of the Illinois statutes was pleaded, and especially paragraphs 161-2-3-4, which provide that no person shall start a vehicle which is parked unless and until such movement can be made with reasonable safety,

plaintiff, who was between the two rails of the main track; defendant's automobile was at an angle to the road, facing plaintiff, and its left front wheel was just about on the north side of the road; that defendant got out of his car and said, "Well, I couldn't help it, I did not see it."

John Smith, another police officer, was with officer Smith when he heard the impact and ran to the scene; that defendant's automobile ran into the rear of the truck and went back to the north side of the road; that plaintiff told him the truck had broken to the left and the accident and the truck driver left.

Manuel Huber, a repair mechanic for the city, testified that plaintiff's motorcycle was knocked in two pieces; that the rider was pushed up close to the rear wheel on the right side and the foot starter crank on the left side was broken off; he said the rear fender goes over the top of the tires and about a foot down over the sides; that this fender was bent at the rear wheel on the right side.

Defendant, a physician, testified that when he got into his car and started the motor he looked away his left shoulder and simultaneously turned his wheels; that he heard the "honking" of a motorcycle and moved his car to the left and forward; that when the accident he stopped his car and got out and helped the injured plaintiff to his office parking; he found that the law was broken and told him "It was embarrassing that this thing should happen to a doctor and get his own doctor." The witness further testified that he had seen the cycle passed his car in the night at 11:15 and 11:30, and in answer to the question whether there was any impact between the motorcycle and his car, replied, "I don't remember."

In court at plaintiff's complaint, chapter 95-1/2 of the Illinois statutes was introduced, and defendant's deposition 101-2-2-4, which provides that no person shall start a vehicle which is loaded unless and until such movement can be made with reasonable safety,

and then only after giving an appropriate signal if any other vehicle may be affected. It was alleged that in violation of this statute defendant started his parked automobile without warning and without giving any signal. The evidence tended to support this allegation. While one who is acquainted with the fact that automobiles are frequently parked along the sides of city streets is bound to anticipate that they might turn into the street, and it is his duty to use reasonable care to avoid a collision (Harrison v. Bingham, 350 Ill. 269), yet this would not excuse a driver in turning his parked car into the street unless this could be done with reasonable safety.

Plaintiff further complains that the court committed reversible error in giving at defendant's request Instruction No. 7. This instruction reads as follows: "The Court further instructs you that if the collision in question was unavoidable, so far as the defendant is concerned, then no liability is incurred by him, whether as a result of it the plaintiff sustained damages; and if in this case the jury believes from all the evidence and under the instructions of the Court that, so far as the defendant is concerned the damage to the plaintiff was unavoidable, then the jury should find the defendant not guilty." It was error to give this instruction. The collision was the result of negligence of either the plaintiff or the defendant or both. It was not unavoidable. In Peters v. Madigan, 262 Ill. App. 417, it was held error, in an automobile collision case, to refer to plaintiff's injuries as resulting from a mere accident and collision without negligence on the part of the defendant. A similar instruction was held error in Streeter v. Humrichouse, 357 Ill. 234, 244, and Mississippi Lime & Material Co. v. Smith, 282 Ill. App. 361, 369. See also Johnson v. Pendergast, 308 Ill. 255, 262, and Sugru v. Highland Park Cab Co., 251 Ill. App. 99, 102.

We are of the opinion the verdict of the jury was against the manifest weight of the evidence and that it was brought about largely by the giving of the erroneous instruction referred to. The judgment will therefore be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P.J., and Matchett, J., concur.

and then only after giving an appropriate signal to any other vehicle may be effected. It was alleged that in violation of this statute defendant started his burned automobile without warning and without giving any signal. The evidence tended to support this allegation.

While one who is negligent after the fact shall not be liable frequently parked along the side of city streets is held to liable despite that they might turn into the street, and it is his duty to use reasonable care to avoid a collision Harvard v. Nichols, 111. 389, yet this would not excuse a driver in turning his burned car into the street unless this could be done with reasonable safety.

Plaintiff further complains that the court committed reversible error in giving as defendant's proper instruction No. V. This instruction reads as follows: "The court further instructs you that if the collision in question was unavoidable, so far as the defendant is concerned, then no liability is incurred by him, whether as a result of it the plaintiff sustained damages; and in this case the jury believes from all the evidence and under the instructions of the Court that, so far as the defendant is concerned the

damages to the plaintiff were unavoidable, then the jury should find defendant not guilty." It was proper to give this instruction. The collision was the result of negligence of either the plaintiff or the defendant or both. It was not unavoidable. In Wright v. Wright, 111. 417, it was held error, in an automobile collision case, to refer to plaintiff's injuries as resulting from a mere accident and collision without negligence on the part of the defendant. A similar instruction was held error in Harvard v. Nichols, 111. 389, 394, and Wright v. Wright, 111. 417, 418, 419, 420, 421, 422. See also Johnson v. Johnson, 111. 382, 383, and Wright v. Wright, 111. 417, 418, 419, 420, 421, 422.

We are of the opinion the refusal of the jury was against the manifest weight of the evidence and that it was brought about largely by the giving of the erroneous instruction referred to. The judgment will therefore be reversed and the case remanded for a new trial.

41232

THOMAS T. NORTH,

Appellee,

APPEAL FROM

v.

CIRCUIT COURT,

JOHN D. WIESE,

Appellant.

COOK COUNTY.

308 I.A. 442²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree which found he had unlawfully withdrawn from the funds of the Thomas T. North Adjustment Company, a corporation, the sum of \$1,985 in excess of his authorized salary and entered judgment against him for that amount in favor of the plaintiff assignee. The same decree finds defendant unlawfully withdrew from the funds of the corporation the sum of \$2,031.61 and used it in the purchase of wheat; that the plaintiff is entitled to an accounting of the proceeds. The cause was re-referred for the statement of this account.

The case was heard on exceptions to the report of a master, some of which were sustained, others overruled. The issues will be better understood after a recitation of some undisputed facts.

Plaintiff has been for many years engaged in the insurance adjustment business in Chicago. On December 24, 1926, he caused the Thomas T. North Adjustment Company to be organized as an Illinois corporation with capital stock of \$10,000; 400 shares of the par value of \$25. Plaintiff was the president and sole manager. He owned 385 of the 400 shares. The other 15 shares were held by two girl employees as gifts. The book value of the assets was \$28,000. Defendant was engaged in the fire insurance adjustment business in Chicago.

Plaintiff and defendant entered into an arrangement whereby plaintiff took out of the corporation these assets in payment for which he returned the capital stock held by him. Plaintiff then deposited a check for \$6,000 to the order of the corporation. Defendant deposited a check for \$4,000 and received 160 shares of the stock. Plaintiff retained 225 shares, which, with the 15 held by employees,

THOMAS T. NORTH,

Appellee,

APPEAL FROM

v.

JOHN D. WISE,

Appellant.

CIRCUIT COURT,

COOK COUNTY,

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree which found he had unlawfully withdrawn from the funds of the Thomas T. North Adjustment Company, corporation, the sum of \$1,985 in excess of his authorized salary as entered judgment against him for that amount in favor of the plaintiff assignee. The same decree finds defendant unlawfully withdrew from the funds of the corporation the sum of \$2,551.51 and used it in the purchase of wheat; that the plaintiff is entitled to an accounting of the proceeds. The cause was re-referred for the statement of this account.

The case was heard on exceptions to the report of a master some of which were sustained, others overruled. The issues will be better understood after a recitation of some undisputed facts.

Plaintiff has been for many years engaged in the insurance adjustment business in Chicago. On December 24, 1908, he caused the Thomas T. North Adjustment Company to be organized as an Illinois corporation with capital stock of \$10,000; 400 shares of the par value of \$25. Plaintiff was the president and sole manager. He owned 500 of the 400 shares. The other 10 shares were held by two other employees as gifts. The book value of the assets was \$20,000. Plaintiff and defendant entered into an arrangement whereby plaintiff took out of the corporation these assets in payment for which he returned the capital stock held by him. Plaintiff then deposited a check for \$6,000 to the order of the corporation. Defendant deposited a check for \$4,000 and received 100 shares of the stock. Plaintiff retained 200 shares, which with the 10 held by employees.

gave plaintiff 60% and defendant 40% of the stock. The furniture and fixtures which plaintiff received from the corporation were valued at \$5,000. Defendant agreed to pay plaintiff \$2,000 for a 40% interest in these. Defendant gave his note for \$2,000 in payment, and the furniture and fixtures were returned to the corporation and treated as surplus. Plaintiff and defendant also agreed plaintiff would draw a salary from the new business of \$12,000 per year and defendant a salary of \$9,000 per year. The 15 shares of stock were not called in and the holders received no part of the assets. There were no stockholders' or directors' meetings. None were ever held until the time at which the corporation was dissolved. Defendant brought in some fire insurance adjustment business which he handled. He gradually took over much of the management of the whole business and for a time supervised the books.

In the latter part of 1934, it was agreed at the suggestion of defendant the salaries should be reduced, plaintiff's to \$10,000 and defendant's to \$7,500. About this time plaintiff contacted London brokers and took on some accounts for Lloyds of London. The new business made additional expense, required more employees and trips to London. On account of these things plaintiff asked defendant that plaintiff's salary should be restored to \$12,000. Plaintiff says nothing was said at the time about defendant's salary, but defendant testifies it was then agreed not only that plaintiff's salary should be restored to \$12,000 but his own to \$9,000, and that these salaries would be adjusted for the whole year.

In April, 1937, upon return of plaintiff from London he suggested to defendant that the relationships between them should be ended and he offered to turn back defendant's stock and return his note which had been given plaintiff in payment for the furniture. On May 28, 1937, plaintiff caused a statement of intention to dissolve the corporation to be filed at Springfield, and May 31, the corporation assigned all its assets to plaintiff. On June 3, the secretary of

gave plaintiff 80% and defendant 40% of the stock. The furniture and fixtures which plaintiff received from the corporation were valued at \$25,000. Defendant agreed to pay plaintiff \$2,000 for a 40% interest in these. Defendant gave his note for \$2,000 in payment, and the furniture and fixtures were returned to the corporation and treated as surplus. Plaintiff and defendant also agreed plaintiff would draw a salary from the new business of \$2,000 per year and defendant a salary of \$2,000 per year. The 15 shares of stock were not called in and the holders received no part of the assets. There were no stockholders' or directors' meetings. None were ever held until the time at which the corporation was dissolved. Defendant brought in some time insurance adjustment business which he handled. He gradually took over much of the management of the whole business and for a time supervised the books.

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state issued a certificate of dissolution. Plaintiff since has conducted the business in his individual name. He began this suit as assignee January 24, 1938.

The first question for determination is whether defendant secretly and without authority drew out \$1,985 in excess of his authorized salary. Defendant says the finding of the decree is in this respect manifestly against the weight of the evidence. Margaret Perkins became a bookkeeper for the business in September, 1936, and continued to so serve until February, 1937. Mr. Rasmussen, an accountant who had performed services for plaintiff for many years, was hired to audit the books in February, 1937. Both Perkins and Rasmussen were hired by plaintiff rather than defendant although at that time defendant was in charge of the books and Miss Perkins usually made entries as directed by him. Rasmussen remained with the corporation until its dissolution.

Plaintiff testified that in October, 1936, in the office of the corporation he spoke to defendant of the increased expenses on account of which it would become necessary to restore his own salary to the former amount of \$12,000. He says he told defendant the extra expense was much more than the difference but he would carry that himself because the restoration of his salary would be all the business could carry; the balance, however, he expected to be paid to him when the business showed a profit, otherwise he would stand it personally. Plaintiff says defendant's salary stayed just where it was. It was not even mentioned by either of them.

To the contrary defendant testifies the plaintiff said defendant's salary would be restored to the amount he received in the beginning, namely, \$9,000 per year. Defendant says he replied, "All right." Thereafter, defendant drew amounts to bring his salary for the year up to this amount, and this is the money which plaintiff now seeks to recover as assignee of the dissolved corporation.

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It is not denied that entries were made in the books at appropriate places showing the amounts drawn by defendant from time to time. Plaintiff says, however, he did not know that this restored salary was being drawn by defendant, and that he never consented to it or acquiesced in it. The burden of proof is on the plaintiff to show his right to recover by a preponderance of the evidence. Plaintiff testifies one way, defendant another. Both are interested financially. The preponderance of the evidence in such a case will usually be found in facts and circumstances surrounding the transactions.

Defendant contends plaintiff's evidence is inherently improbable. We think it is. These were the only two persons substantially interested in the business. When plaintiff's salary was restored it seems probable that the question of whether defendant's salary also should be restored would at least be given some consideration. If there was to be discrimination the reasons for it would probably be stated. The profit and loss statement for October, 1936, showed an item of \$625 for defendant's salary. The bookkeeper said this item was made as directed by defendant. He denies this and says it was the result of a mistake by her. However, with the exception of this October statement the amounts which defendant withdrew appear not only on the books but in the profit and loss statement and trial balances which from time to time were made out and placed on plaintiff's desk and defendant's desk.

Rasmussen is dead. Plaintiff was permitted to testify that Rasmussen at one time brought to him a check for \$750 for defendant's salary which plaintiff refused to sign, saying defendant's salary was only \$625 per month. No explanation was given as to why this matter was not then taken up with defendant. The supposed check was not produced. It is true the checks for defendant were not drawn at \$750 for each month. As a matter of fact, they were not drawn at \$1,000 per month for plaintiff. However, the final check for defendant's salary was drawn at the rate of \$750 per month. Rasmussen drew it and plaintiff signed it. There was no concealment in the books. An auditor friendly to plaintiff and unfriendly to defendant was in charge for several months before the affairs of the corporation were wound up. We find it difficult to believe that plaintiff at the time

he made the deal with defendant for taking over his interest in the business and winding up their affairs was ignorant of defendant's claim or of the fact that he had been drawing salary at the rate of \$9,000 per year.

We are not unaware of the rule that a court of review will not reverse the finding of a master approved by the chancellor unless it is manifestly against the weight of the evidence. Pasedach v. Auw, 364 Ill. 491; Zamis v. Hanson, 302 Ill. App. 404. Nevertheless, we are constrained to hold that the finding of this alleged overpayment of salary drawn secretly and without the knowledge or acquiescence of plaintiff is manifestly contrary to the weight of the evidence.

As to the wheat transaction the facts are not in dispute. In December, 1936, defendant proposed to plaintiff they purchase some salvage wheat resulting from a fire loss at Linton, Indiana. Plaintiff agreed. He stated he would bear one-half of the loss, if any, the profits, if any, to be equally divided. Defendant sold part of the wheat for \$2,718.39. He then drew his personal check for that amount and December 4, 1936, drew from the business the sum of \$2,031.61, and with these funds paid for the wheat, the purchase price of \$4,750. This was the only money used in the deal. Plaintiff did not know any part of the money had been drawn from the business until after May 19, 1937. On April 5, 1937, defendant had returned this \$2,031.61 and about the same time he delivered to plaintiff a check for \$1,007.66, as plaintiff's share of profits. Some time after May 19, 1937, plaintiff turned this sum over to the corporation. Defendant's part in the transaction appears on the books under the heading "Miscellaneous Adjustment Expense." Entries are in the handwriting of Margaret Perkins. The transaction also appears in a loose-leaf sheet of the books in the handwriting of defendant.

It is not disputed plaintiff entered into this deal with defendant. He did not expressly authorize the use of the money of the corporation although he was aware that some money would be needed.

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We are not unaware of the rule that a court of review will not reverse the finding of a master approved by the controlling evidence. It is manifestly against the weight of the evidence. Langston v. Langston, 364 Ill. 401; Langston v. Langston, 308 Ill. App. 401. Nevertheless, we are constrained to hold that the finding of this alleged overpayment of salary drawn secretly and without the knowledge or consent of the plaintiff is manifestly contrary to the weight of the evidence.

As to the wheat transaction the facts are not in dispute. In December, 1936, defendant proposed to plaintiff they purchase some salvage wheat resulting from a fire loss at Clinton, Indiana. Plaintiff agreed. He stated he would bear one-half of the loss, if any, the profits, if any, to be equally divided. Defendant sold some of the wheat for \$2,718.30. He then drew his personal check for that amount and December 4, 1936, drew from the business the sum of \$2,031.61, and with these funds paid for the wheat, the purchase price of \$4,750. This was the only money used in the deal. Plaintiff did not know any part of the money had been drawn from the business until after May 19, 1937. On April 6, 1937, defendant had returned this \$2,031.61 and about the same time he delivered to plaintiff a check for \$1,007.68, as plaintiff's share of profits. Some time after May 19, 1937, plaintiff turned this and their own contribution. Defendant's part in the transaction appears on two books under the heading "Miscellaneous Adjustment Expenses." Entries are in the loose-leaf sheet of the book in the handwriting of defendant. Writing of Margaret Perkins. The transaction also appears in a loose-leaf sheet of the book in the handwriting of defendant. It is not disputed plaintiff entered into this deal with defendant. He did not expressly authorize the use of the money of the corporation although he was aware that some money would be needed.

He says he told defendant he would go into the deal only on condition that he would not have to put any money up. Plaintiff was a party to the deal, took his share of the profits which later he turned over to the corporation. Then he bought defendant's stock. He returned to defendant his note given at the beginning of their relationship. Every circumstance indicates it was the intention of the parties ^{that} this sale by defendant to plaintiff of his stock and the return of defendant's note would sever their business relationship and settle accounts growing out of it.

The decree speaks of the corporation as if it were conducted in the usual way. It was not. In fact it was a mere shell - a "corporate veil." The corporate structure, except in name, had been disregarded by both parties. The board of directors never fixed plaintiff's salary at any time. Plaintiff drew checks, defendant likewise without authority other than their own desire. Having in their business relationship disregarded the corporate structure entirely plaintiff now having attained entire control and ownership of the assets by assignment seeks to resurrect it to his own advantage and under circumstances bringing about inequitable results. For months an auditor chosen by plaintiff and a bookkeeper selected by him (the auditor having ill will toward defendant and the bookkeeper not being friendly to him) were in charge of the books of the business which showed all these transactions. Plaintiff seeks to maintain his claims upon the theory that he was ignorant of what was happening. It is impossible to think this was true. If true, he was negligent and in either case is precluded.

Plaintiff's evidence shows while in London he had resolved to sever these business relationships. He evidently had a plan. It included the dissolution of the corporation, and it is reasonable to suppose plaintiff was well advised. Plaintiff and defendant had run this business as if it were a partnership. It was entirely proper they should do so. But in the settlement of their affairs it is not reasonable to suppose defendant understood at the time he fixed the

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price for his stock that he was transferring to plaintiff claims against himself which would probably exceed the amount he received for his stock. Hamilton v. Wells, 182 Ill. 144. In such case the corporate entity will be disregarded to the end that justice may prevail. Fletcher Cyclopedic Corporations, Vol. 1, p. 134; Paul v. University Motor Sales, 283 Mich. 587, 278 N. W. 714. The Michigan court said:

"The abstraction of the corporate entity should never be allowed to bar out and pervert the real and obvious truth. 14 C. J. 61. In order to carry out the intention of the parties to the contract in this case, we disregard the fiction that the corporate existence of defendant company was distinct from that of plaintiff stockholders at the time the stock was sold."

The decree will be reversed and the cause remanded with directions to dismiss the complaint for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P.J., and McSurely, J., concur.

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REVEREND AND HONORABLE THE JUDGES.

O'Connor, P.J., and McNulty, J., concur.

41317-41334

R. GILLIES,

Appellee,

APPEAL FROM

v.

CIRCUIT COURT,

E. B. MARSHALL,

Appellant,

COOK COUNTY.

BRADY'S STAMP SHOP, INC.,

Appellant.

308 I.A. 443

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff on November 16, 1938, began suit by attachment against defendant Marshall and caused the attachment writ to be levied on certain furniture and packages of stamps. Brady's Stamp Shop, Inc. filed an intervening petition claiming the property levied on belonged to it. Plaintiff filed an amended complaint of three counts based on three transactions in which it was averred defendant with the assistance of plaintiff's confidential advisor by false representations obtained from her securities of the value of \$11,600; and an amended complaint in one count based on all of these transactions, in one of which it was claimed defendant converted these securities. Thereafter plaintiff expressly waived the tort. Defendant traversed the affidavit for attachment. The cause was put at issue and tried by the court. On January 22, 1940, there was a finding for plaintiff based on the first and third transactions for an amount equal to secret commissions of \$2,312.02, which defendant paid to Schuffman, whom he knew to be plaintiff's confidential advisor and trusted agent and with whom defendant conspired to defraud plaintiff. On that date also an order was entered sustaining the attachment and another order dismissing the intervening petition of Brady's Stamp Shop, Inc. Further claims of plaintiff were continued until February 16, 1940. At that time there was a further finding for plaintiff in the sum of \$3,532, on which judgment was entered. There was also a finding that malice was the gist of this action and an order that a capias ad satisfaciendum issue.

41317-41334

R. GILLIE,

v.

R. B. MANHART,

Appellant.

BRADY'S STAMP SHOP, INC.,
Appellant.

MR. JUSTICE MANTON delivered the opinion of the court.

Plaintiff on November 16, 1938, began suit by attachment against defendant Karel and caused the attachment suit to be levied on certain furniture and fixtures of Karel, Brady's Stamp Shop, Inc. filed an intervening petition claiming the property levied on defendant to it. Plaintiff filed an amended complaint of three counts based on three transactions in which it was averred defendant with the assistance of plaintiff's confidential advisor by false representations obtained from her securities of the value of \$1,500; and an amended complaint in one count based on all of these transactions, in one of which it was claimed defendant converted these securities. Defendant answered the complaint for attachment. The cause was put at issue and tried by the court. On January 22, 1940, there was a finding for plaintiff based on the first and third transactions for an amount equal to correct damages of \$2,312.02, which defendant paid to plaintiff, who is now to be paid plaintiff's confidential advisor and trustee agent and with whom defendant conspired to defraud plaintiff. On that date also an order was entered sustaining the attachment and another order sustaining the intervening petition of Brady's Stamp Shop, Inc. Plaintiff's petition was continued until January 16, 1940, at which time there was a further finding for plaintiff in the sum of \$1,500, on which judgment was entered. There was also a finding that Karel was the first of this action and in order that a correct judgment be entered.

Marshall appeals from the order sustaining the attachment and from the money judgment of February 16, 1940. Brady's Stamp Shop, Inc. appeals from the order dismissing its intervening petition. These appeals have been consolidated for hearing.

Marshall is president of Brady's Stamp Shop, Inc. and a joint brief is filed in behalf of the company and of him personally. The grounds for the attachment were stated to be that defendant Marshall had within two years fraudulently concealed or disposed of his property so as to hinder or delay his creditors, and further that he was about so to do.

It is first contended for reversal that the court erred in ruling certain evidence on the attachment issue admissible. Brady v. Marshall, 302 Ill. App. 151, is cited. It is said the issue here is the same as there. The cases are different. The court there excluded material evidence offered. The objection here is that immaterial evidence was admitted. As the trial here was by the court it will be presumed that any immaterial evidence was disregarded by the court in making its finding. Merchants' Dispatch v. Joesting, 89 Ill. 152, 155; Radtke v. People, 171 Ill. App. 462. Moreover, we think the evidence here objected to was admissible.

The amended complaint charged defendant had defrauded plaintiff in three different transactions. Defendant contends that the court erred in entering judgment on the second of these because the finding is against the weight of the evidence. Plaintiff was a widow owning considerable property and residing at Burlington, Iowa. She had a financial advisor on whom she much relied in her business transactions. Knowing this and knowing this advisor, the evidence shows defendant conspired with the advisor to get her property from her, succeeded in doing so, and that defendant then paid the advisor a commission for his assistance. Plaintiff did not testify, but by stipulation two affidavits made by her as to the facts were admitted in lieu of her testimony. As to this second transaction she said de-

was about so to do.

It is first contended for reversal that the court acted in ruling certain evidence on the attachment issue immaterial. People v. Marshall, 303 Ill. App. 131, is cited. It is said the issue here is the same as there. The cases are different. The court there excluded material evidence offered. The objection here is that immaterial evidence was admitted. As the trial here was by the court it will be presumed that any immaterial evidence was disregarded by the court in making its finding. People v. Marshall, 303 Ill. App. 131, 132; People v. People, 171 Ill. App. 482. Moreover, it is said the evidence here objected to was admissible.

The amended complaint charged defendant had obtained plaintiff in three different transactions. Defendant contends that the court erred in entering judgment on the second of these because the finding is against the weight of the evidence. Plaintiff was a woman owning considerable property and residing at Burlington, Iowa. She had a financial advisor on whom she much relied in her business transactions. Knowing this and knowing this action, the evidence shows defendant conspired with the advisor to get her money from her, succeeded in doing so, and that defendant then paid the advisor a commission for his assistance. Plaintiff did not testify, but by stipulation two affidavits were by her as to the facts were admitted.

defendant came to her home March 22, 1935, and that in reliance upon his promise to give her other securities yielding a greater return than her own she delivered to him four certain bonds of the par value of \$1000 each. He told her at this time that he was the man her advisor had before introduced to her. She gave him the bonds upon his promise to give her other securities bringing higher income, which he did not do.

Defendant on the contrary testifies that at that time he promised plaintiff that he would deed to her in exchange for her bonds lots situated in Muscle Shoals, Alabama. In corroboration he offered in evidence a deed signed by himself and wife made on the same date and acknowledged before a notary public at Peoria, Illinois, conveying lots in Muscle Shoals to plaintiff. Defendant, therefore, insists this court should find that the second transaction was an exchange of real estate for securities. Defendant suggests there is other proof in his favor now available, namely, that plaintiff forwarded the deed to Alabama for record. Defendant made a motion (which was denied) to set aside the judgment that this proof might be made as well as proof of purchase by plaintiff of other lots in the same locality. After the first and before the second judgment was entered defendant was given two weeks to produce any such evidence but did not do so. On the trial he testified that this transaction with plaintiff was evidenced by a written contract. The written contract was not, however, produced. His own evidence throughout the trial justifies an inference of unreliability as a witness and utter lack of honesty as a business man. His entire evidence is reviewed in the brief for plaintiff, and its misstatements and inconsistencies pointed out. It would unduly extend this opinion to recite them. At the close of the case the trial judge said: "Let the record show that in coming to my conclusion I hold that Marshall has knowingly and wilfully testified falsely to material matters at issue in this cause, and I therefore have disregarded certain testimony given by him except insofar as

Defendant came to her home March 22, 1935, and that in reliance upon his promise to give her other securities yielding a greater return than her own she delivered to him four certain bonds of the par value of \$1000 each. He told her at this time that he was the man her advisor had before introduced to her. She gave him the bonds upon his promise to give her other securities bringing higher income, which he did not do.

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-4-
such testimony was corroborated by other credible testimony appearing in evidence, or facts and circumstances appearing in evidence." We have examined the evidence and agree with the court.

Defendant next contends the court erred in not ordering a deposition of defendant taken before a master in chancery to be filed. Defendant says that inasmuch as the deposition was taken pursuant to Article VII, §58, par. 2 of the Civil Practice act and rule 19 of the Supreme court, as amended at the June Term, 1935, the report should have been filed and considered by the court in its entirety, whereas only a portion of it appearing in a supporting affidavit of the court reporter upon a motion for summary judgment was considered. Defendant testified on the trial. Appellants had the opportunity to cross-examine him and did so. So far as the record discloses they never asked to have the deposition filed and the point now made was never called to the attention of the trial court. In the absence of an objection in the trial court the point cannot now be raised. Ravlin v. Chicago, Aurora & DeKalb Rd. Co., 297 Ill. 130, 133; Tegtmeyer v. Tegtmeyer, 306 Ill. App. 169; Vonesh v. City of Berwyn, 324 Ill. 483. Furthermore, defendant is precluded from making this point by reason of the fact that plaintiff offered to put the deposition in evidence at the trial and defendant objected. Hahl v. Brooks, 213 Ill. 134; Chicago & Alton R. R. Co. v. Walker, 118 Ill. App. 397, 402.

It is also argued that the order dismissing the intervenor's petition should be reversed because the court failed to consider uncontradicted evidence given by the witness, Grace M. Lemon. Miss Lemon testified in substance that she and three of her sisters had invested \$39,000 in Brady's Stamp Shop and that prior to that time she had made other investments through Mr. Marshall in the Kelly-Foreman corporation, which was liquidated by Marshall and the proceeds invested in Brady's Stamp Shop, Inc. If true, the evidence was quite material. The trial court did not believe her testimony. She and Marshall contradicted each other ^{and themselves} upon material points. The trial court character-

each testimony was corroborated by other credible testimony appearing in evidence, or facts and circumstances appearing in evidence. The court have examined the evidence and agree with the court.

Defendant next contends the court erred in not ordering a deposition of defendant taken before a master in conformity to be filed. Defendant says that inasmuch as the deposition was taken pursuant to Article VII, §56, par. 2 of the civil practice act and rule 19 of the Supreme court, as amended at the June term, 1975, the report should have been filed and considered by the court in its entirety, whereas only a portion of it appearing in a supporting affidavit of the court reporter upon a motion for summary judgment was considered. Defendant testified on the trial. Plaintiff had the opportunity to cross-examine him and did so. So far as the record discloses any error asked to have the deposition filed and the point not made was never called to the attention of the trial court. In the absence of an objection in the trial court the point cannot now be raised. Galvin v. Chicago, Aurora & Rock Island R.R. Co., 297 Ill. 120, 121; Testmeyer v. Testmeyer, 306 Ill. App. 109; Vonach v. City of Chicago, 344 Ill. 441. Furthermore, defendant is precluded from making this point by reason of the fact that plaintiff offered to put the deposition in evidence at the trial and defendant objected. Idell v. Brown, 213 Ill. 144; Chicago & Alton R.R. Co. v. Walker, 118 Ill. App. 127, 128.

It is also argued that the order dismissing the intervenor's petition should be reversed because the court failed to consider the contradicted evidence given by the witness, Grace A. Lemon. Idell testified in substance that she and James A. Walker had invested \$50,000 in Brady's Stamp Shop and that prior to that time she had made other investments through Mr. Marshall in the Kelly-Forman corporation, which was liquidated by Marshall and the proceeds invested in Brady's Stamp Shop, Inc. If true, the evidence was quite material. The trial court did not believe her testimony. She and Marshall contradicted each other upon material points. The trial court characterized and themselves

ized her evidence as "incredible." The court said: "It is incredible that a woman who has been a school teacher and apparently an intelligent person, would take all that she had on earth outside of her farm, all her money and all the investments that she had and all the assets of her three sisters and turn it over, nilly-willy, to a total stranger who used the money as his own, and let him do with it as he pleased, and then be able to come over here after what has happened to this business, and it must be evident to her that no matter what happens in the lawsuits, little would be left of this concern, and so with such little concern accept her loss without showing the slightest emotion, the slightest feeling in connection with it, and from time to time even changing her testimony in order to safeguard, as it appeared in her mind, the interests of Marshall." The capital stock of the corporation was only \$4,000.

It was for the intervenor on the trial to prove its title to the property by a preponderance of the evidence. The trial judge held it did not do so. The question before this court is whether the finding of the trial judge is clearly and manifestly against the evidence. The finding of the court is entitled to the same weight as the verdict of a jury. We cannot on this sort of testimony reverse the finding.

Defendant argues for reversal on the theory that the second amended complaint in a single count contains three separate causes of action, and cites Randall Dairy Co. v. Beverly Dairy Co., 278 Ill. App. 350. Defendant says the transaction of March 22, 1935, contained the elements of a tort and is improperly stated in a single count with the other two claims, citing Article VI, §33, par. 2 of the Civil Practice act. On the trial plaintiff expressly waived any claim of tort in the complaint. Plaintiff, we think, had a right to do this. Independent Oil Men's Ass'n. v. Fort Dearborn Nat'l Bank, 311 Ill. 278, 281. Although the tort was waived a capias might be directed to issue. See In re Paar, 264 Ill. App. 372. Here, again, however, defendant seeks to obtain a reversal by raising a point not at any time called

used her evidence as "incredible." The court said: "It is incredible that a woman who has been a school teacher and apparently an intelligent person, would take all that she had on earth outside of her family all her money and all the investments that she had and all the money of her three sisters and turn it over, nifty-willy, to a total stranger who used the money as his own, and let him do with it as he pleased, and then be able to come over here after what has happened to this business, and it must be evident to her that no matter what happens in the lawsuit, little would be left of this concern, and so with such little concern except her loss without showing the slightest emotion, the slightest feeling in connection with it, and from this to time even changing her testimony in order to safeguard, as it appeared in her mind, the interests of Marshall." The capital stock of the corporation was only \$4,000.

It was for the intervenor on the trial to prove the title to the property by a preponderance of the evidence. The trial judge held it did not do so. The question before this court is whether the finding of the trial judge is clearly and manifestly against the evidence. The finding of the court is entitled to the same weight as the verdict of a jury. We cannot on this sort of testimony reverse the finding.

Defendant argues for reversal on the theory that the amended complaint in a single count contains three separate causes of action, and cites Handell v. Beverly Dairy Co., 275 Ill. App. 330. Defendant says the transaction of March 22, 1935, contained the elements of a tort and is improperly stated in a single count with the other two claims, citing Article VI, Sec. 2 of the Civil Practice act. On the trial plaintiff expressly waived any claim of tort in the complaint. Plaintiff, we think, had a right to do this. Indebentant Oil Co. v. Fort Harrison Refining Co., 211 Ill. 478, 281. Although the tort was waived a complaint might be directed to issues. See in re Farmer, 284 Ill. App. 475. Here, again, however, defendant seeks to obtain a reversal by raising a point not at any time called

to the attention of the trial court. We have already cited the cases showing this is not permissible.

It is urged in the next place that the grounds alleged for the attachment were not proved and that the court erred in entering the order of January 22, 1940, sustaining the attachment. The evidence shows without dispute that the Brady Stamp Shop purchased the business now conducted by it without any compliance on the part of the vendor with the Bulk Sales act. This alone would not be sufficient to show fraud within the meaning of the attachment act. United Paper Trading Co. v. Allen, 222 Ill. App. 261. Brady v. Marshall, 302 Ill. App. 151. The evidence shows that the Brady Stamp Shop, Inc. was incorporated on March 14, 1938; that Marshall thereafter voluntarily turned over to it his own property at a time when he was heavily indebted and in particular owed Mr. Brady \$7500 of the purchase price of the stamp shop. He owed numerous other creditors, including plaintiff, large sums of money at that time. He was rendered insolvent by this transaction. This was sufficient to sustain the finding of the court. Reisch v. Bowie, 367 Ill. 126. All the surrounding facts indicate a fraudulent intention on the part of defendant, and in fraud cases it is usually necessary to resort to circumstances for proof. We hold the trial court properly sustained the attachment.

It is finally urged that the judgment entered on February 16, 1940, was contrary to law because there was an improper joinder of more than one cause of action in a single count. This is said to be not permissible under Article VI, §33, par. 2 of the Civil Practice act. The entry of more than one judgment in that case is, we think, expressly authorized by §50 of that act. Moreover, no objection was made on this ground in the trial court, and for reasons already stated the question cannot be raised in this court.

Defendant further argues that the order of January 22, 1940, dismissing the intervening petition was contrary to the law and the

to the attention of the trial court. We have already cited the cases showing this is not permissible.

It is urged in the next place that the grounds alleged for

the attachment were not proved and that the court erred in entering the order of January 22, 1940, sustaining the attachment. The evidence shows without dispute that the Brady Stamp Shop purchased the business now conducted by it without any compliance on the part of the vendor with the Bulk Sales act. This alone would not be sufficient to show fraud within the meaning of the attachment act. United States Trust Co. v. Allen, 232 Ill. App. 2d, 1940, 131.

The evidence shows that the Brady Stamp Shop, Inc. was incorporated on March 14, 1938; that Marshall thereafter voluntarily turned over to it his own property at a time when he was heavily indebted and in default of numerous other creditors, including Plaintiff, large sums of money at that time. He was rendered insolvent by this transaction. This was sufficient to sustain the finding of the court. Allen v. Bowie, 367 Ill. 126. All the surrounding facts indicate a fraudulent intention on the part of defendant, and in such case it is usually necessary to resort to circumstances for proof. We hold the trial

court properly sustained the attachment.

It is finally urged that the judgment entered on January 16, 1940, was contrary to law because there was an improper joinder of more than one cause of action in a single count. This is said to be not permissible under Article VI, § 13, of the Illinois Constitution. The entry of more than one judgment in that case is, we think, expressly authorized by § 60 of that act. Moreover, no objection was made on this ground in the trial court, and for reasons already stated the question cannot be raised in this court.

Defendant further argues that the order of January 22, 1940, dismissing the intervening petition was contrary to the law and the

evidence. We think what has already been said in this opinion is sufficient on this point. The simple truth is that the court did not believe defendant or his witnesses, and after a careful examination of the record this court on all the issues agrees with the findings of the trial judge.

All the judgments will therefore be affirmed.

JUDGMENTS AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

evidence. We think that has already been said in this opinion is sufficient on this point. The simple truth is that the court did not believe defendant of his witness, and after a careful examination of the record this court on all the issues agrees with the findings of the trial judge.

All the judgments will therefore be affirmed.

UNANIMOUS AFFIRMED.

O'Connor, P.J., and McGowan, J., concur.

1607
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do. 41
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 667

BE IT REMEMBERED, that afterwards, to-wit: On 1899
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

20. 1891. 1892. 1893. 1894. 1895. 1896. 1897. 1898. 1899. 1900. 1901. 1902. 1903. 1904. 1905. 1906. 1907. 1908. 1909. 1910. 1911. 1912. 1913. 1914. 1915. 1916. 1917. 1918. 1919. 1920. 1921. 1922. 1923. 1924. 1925. 1926. 1927. 1928. 1929. 1930. 1931. 1932. 1933. 1934. 1935. 1936. 1937. 1938. 1939. 1940. 1941. 1942. 1943. 1944. 1945. 1946. 1947. 1948. 1949. 1950. 1951. 1952. 1953. 1954. 1955. 1956. 1957. 1958. 1959. 1960. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572

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Die folgenden drei Abschnitte sind als Beispiele für die Anwendung der in den vorherigen Abschnitten entwickelten Methoden dargestellt. In jedem Abschnitt wird ein konkretes Problem formuliert, das mit Hilfe der vorgestellten Methoden gelöst werden kann. Die Beispiele sind so gewählt, dass sie die Vielfalt der möglichen Anwendungen der vorgestellten Methoden verdeutlichen. Die Beispiele sind in der Reihenfolge angeordnet, in der sie in der Arbeit vorkommen. Die Beispiele sind so gewählt, dass sie die Vielfalt der möglichen Anwendungen der vorgestellten Methoden verdeutlichen.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.

OCTOBER TERM, A.D. 1940.

FRED A. JACOBS, PLAINTIFF, APPELLEE,

VS.

ALBERT J. WEIL, DEFENDANT, APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY,
ILLINOIS.

WOLFE,--P. J.

This case is brought to this Court upon an appeal from a judgment finding the defendant, Albert J. Weil, guilty and assessing damages against him in the sum of \$3,000.00. The Court further found that said damages are for a tort committed by the defendant against the plaintiff and that malice is the gist of the action.

A dispute arose between the appellee, Fred A. Jacobs, and Mr. Theodore Korb, a young attorney, in the Office of the Firm of Weil & Weil in the City of Peoria. Mr. Jacobs went to the Office of Weil & Weil and there had a conversation with Mr. Albert J. Weil relative to a judgment that had been taken against Mr. Jacobs in the County Court of Peoria County. The witnesses' testimony is conflicting as to this conversation. The evidence tends to show that it was heated. Mr. Weil ordered Mr. Jacobs to get out of his office and Mr.

Jacobs did not do so, so Mr. Weil took him by the collar and evicted him from the office, after which he struck Mr. Jacobs in the eye with his fist which caused the damage complained of. Mr. Jacobs, at the time the blow was struck, was wearing glasses. The blow broke the glasses and a piece of the glass was driven into Mr. Jacob's eye, which caused the loss of the sight thereof. Just where the parties were when the appellant struck the blow which caused the damage to appellee's eye, is in sharp dispute, but it was several feet from the door that leads into Mr. Weil's Office.

The case was tried before the Court without a jury. It is first insisted that the trial court admitted improper evidence over the objection of the plaintiff. We find no merit in this contention and even if there was, it ~~has~~ ^{has} long been the established rule that when a jury is waived and the case is tried before the Court, that it is presumed that the Court will consider only the competent evidence in the case.

It is next insisted that the findings of the Court are contrary to the manifest weight of the evidence. From a reading of the evidence, as abstracted, both by the appellant and appellee, it is our conclusion that the judgment is not against the manifest weight of the evidence, but the findings of the Court are supported by the evidence. The appellant contends that the Court erred in finding, "that malice was the gist of the action." A review of the evidence would serve no useful purpose, but we think it clearly preponderates in favor of the appellee, and that the blow which was struck by the appellant, was not in his necessary self defense, and that the Court very properly held that the actions of the defendant denoted malice.

We find no reversible error in the case and the judgment of the Trial Court is affirmed.

Affirmed.

THE END

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

9657
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

308 I.A. 668'

BE IT REMEMBERED, that afterwards, to-wit: On

the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF THE HISTORY OF ARTS AND ARCHITECTURE
1100 EAST 58TH STREET, CHICAGO, ILLINOIS 60637
TEL. 773-936-5000 FAX 773-936-5001

OFFICE OF THE DEAN OF THE FACULTY OF THE DIVISION OF THE PHYSICAL SCIENCES

530 SOUTH MICHIGAN AVENUE, CHICAGO, ILLINOIS 60605

TEL. 773-936-5000 FAX 773-936-5001

WWW.DIVISION.PHYSICS.EDU

WWW.DIVISION.PHYSICS.EDU

THE UNIVERSITY OF CHICAGO, 530 SOUTH MICHIGAN AVENUE, CHICAGO, ILLINOIS 60605
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DEPARTMENT OF THE HISTORY OF ARTS AND ARCHITECTURE

1100 EAST 58TH STREET, CHICAGO, ILLINOIS 60637

TEL. 773-936-5000 FAX 773-936-5001

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, 1940.

IN THE MATTER OF THE LAST WILL
AND TESTAMENT OF EDWARD C.
McCLARY, DECEASED,
(PEARL M. PETERS,

APPELLEE,)

vs.

JOHN A. BERRY, ADMINISTRATOR
WITH THE WILL ANNEXED OF THE
ESTATE OF EDWARD C. McCLARY,
DECEASED, and FRANK W. McCLARY,

APPELLANTS.)

APPEAL FROM THE CIRCUIT
COURT OF LASALLE COUNTY.

HUFFMAN, J.

Edward C. McClary died testate on December 4, 1939. Appellee, Pearl M. Peters, was named as executrix in his will. She employed Mr. Ralph A. Green, attorney, to represent her as executrix. He secured authorization from the Attorney General to open the safety deposit box of the deceased. The box was opened, the will taken therefrom and filed in the office of the probate clerk on December 8, 1939. Mr. Frank W. McClary, a brother of the deceased, was present at the time the will was taken from the lock box. Attorney Green states that he knew in a general way the heirship of the deceased, but that there was one nephew, Fred Powers, whose address was not then known. He says that Mr. Frank W. McClary stated he did not know the address of this nephew and had not heard from him for ten years. The attorney further testified that said appellant called at his office a few days later and stated that

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. HAYES

Appellant

IN THE MATTER OF THE ESTATE OF
EDWARD G. COLLIERY, DECEASED,
(THOMAS L. PETERS, Executor)

(Respondent)

vs.

JOHN A. PERRY, Executor of the
Estate of EDWARD G. COLLIERY,
DECEASED, and THOMAS L. PETERS,
Executor.

Appellee

HUTCHINS, J.

Edward G. Colliery died testate on December 4, 1930. His will, which was admitted to probate in the Circuit Court of the District of Columbia, named Pearl M. Peters as executrix. Mr. Ralph A. Green, attorney, to represent her as executrix, secured authorization from the Attorney General to open the sealed deposit box of the deceased. The box was opened, the will taken therefrom and filed in the office of the probate clerk on December 8, 1930. Mr. Frank J. Volney, a brother of the deceased, was present at the time the will was taken from the box. Mr. Green states that he knew in a general way the contents of the will, but that there was one item, the name of the executor, which was not then known. He says that Mr. Volney advised him that he did not know the address of this person and that he would find him for ten years. The attorney then proceeded to search for the appellant called on his office a few days later and advised him

he had written the other members of the family to find out what they knew about Fred Powers, and would advise the attorney as soon as he received any information.

Shortly thereafter the attorney was taken ill and it was not until the following March that he was able to return to his office. In the meantime, he had been unable to obtain any information as to the address of Powers or whether he was then living. On February 6th, following the death of Mr. McClary in December, his brother Frank W. McClary, filed with the clerk of the probate court his relinquishment and nominated John A. Berry public administrator, to be the administrator of said estate. Following this, and on February 8th, appellee through Mr. Ernest H. Pool, an attorney acting in the stead of Mr. Green who was sick, caused her petition for probate of the will ~~to~~ be filed, stating that she was ready and willing to qualify as the executrix named therein. The brother, Frank W. McClary, objected to the appointment of appellee ~~as~~ executrix. The probate court denied her petition to be appointed executrix on the ground that she had not filed same until more than sixty days after she had knowledge that she was named as executrix. The public administrator was appointed as administrator of the estate with the will annexed. Appellee appealed from that order to the Circuit Court of said county. That court revoked the letters issued to the public administrator and by its judgment ordered letters to issue to appellee. The appellants prosecute this appeal from that judgment.

Appellants urge in this appeal that appellee was precluded from being appointed executrix under the will because of her

he had written the other copies of the will in his own hand, and that they were all true and correct copies of the original will, and that he had received and investigated the same as soon as he received any information.

Shortly thereafter the executor was called in and was not called the following day and was called again the following day. In the meantime, he had been unable to obtain any information as to the address of the testator at the time of his death. On February 2nd, following the death of the testator in December, his brother Frank A. Green, died with the will of the testator about his possession and possession of the same. The public administrator, to be the administrator of said estate.

Following this, and on February 10th, the executor, H. Pool, an attorney acting in the name of Mr. Green who was at the time, caused her petition for probate of the will to be filed, stating that she was ready and willing to verify the same.

The executor, Frank A. Green, objected to the appointment of applicant as executor. The probate court denied her petition to be appointed executor on the ground that she had not filed same within sixty days after the death of the testator. The public administrator was named as executor. The public administrator was appointed as administrator of the estate of the testator.

Applicant appeared from that time to the probate court of said county. That court revoked the letters issued to the public administrator and by its judgment ordered that the public administrator be appointed as executor of the estate of the testator. The public administrator was named as executor. The public administrator was appointed as executor of the estate of the testator.

Applicant does in this petition pray that the probate court of said county be appointed as executor of the estate of the testator.

failure to institute proceedings to have the same admitted to probate within thirty days, as provided by Sec. 214 of the Probate Act of 1940. That section provides that any person acquiring knowledge that he is named as executor of a will of a deceased person shall either declare his refusal to so act or institute proceedings to have the will admitted to probate within a period of thirty days, and upon his failure so to do, "except for good cause shown," the court "may" deny him the right to so act.

It is urged by appellee that a will speaks from the death of the testator and that the Probate Act in force prior to the present act of 1940 applies; and that under the old act, there was no limitation fixed as to the time within which the will could be probated and letters issued to the person named as executrix therein, but that a penalty was provided for instead of a disqualification to act. In this respect, they refer to Sec. 2 of Ch. 3 of the Act in force in 1939.

It appears herein that the executrix is the chief beneficiary under the will and that she was no relation to the deceased. The act in force in 1939, as urged by appellee, (Ch. 3, Sec. 2, Ill. St. 1939) provided for a penalty on the part of any person knowing that he was named as the executor of a will, who did not cause the same to be proved and recorded in the proper county within thirty days or declare his refusal to act, within such time. However, this section relieved such person of the penalty named for "just excuse" for any such delay. The Probate Act of 1940, upon which appellant relies, provides by Sec. 214

Failure to institute proceedings to have the same removed is
prop to within thirty days, as provided in sec. 214, 1907
Probate Act of 1940. That section provides that if a
creditor knows that he is being defrauded or is being
a defrauded person shall either institute proceedings to have
on institute proceedings to have the will admitted to probate
within a period of thirty days, and upon the failure to do so
"except for good cause shown," the court may "set aside the
right to do so."

It is argued by appellants that a will speaks from the date
of the testator and that the statute was in force prior to the
present act of 1940, and that under the old act, there
was no limitation fixed as to the time within which the will
could be probated and letters issued to the person named as
executor thereof, but that a person was provided for in case
of a disqualification to act. In this respect, see, *Rever*
Sec. 2 of Ch. 2 of the act in force in 1937.

It appears herein that the executor is the one who
violates under the will and that this was no violation of the law
ceased. The act in force in 1937, as amended by appellants, (Ch. 2)
Sec. 2, Ill. Civ. 1937) provided that a person on the day of his
person knowing that he was named as the executor of a will, who
did not cause the same to be proved and recorded in the probate
court within thirty days or before his refusal to act, within
such time. However, this section relates to the probate of the
person named for "probate" and not to the will. The present
Act of 1940, upon which appellants rely, provides that the

thereof (Ch. 3, Sec. 214, Probate Act of 1940) that any person having knowledge that he is named as executor of the will of a deceased person, shall either declare his refusal to act or institute a proceeding to have the will admitted to probate in the proper county within thirty days after he acquires such knowledge. This section further provides that upon his failure so to do, "except for good cause shown," the court "may" deny him the right to so act. In either event, we find that a discretion rests with the court in regard to such matters and that under the present act, for good cause shown, the court may disregard the failure to declare a refusal or to take steps to secure an order to probate a will within the time named.

Appellee in this instance filed the will with the clerk of the probate court on the same day that it was taken from the safety deposit box of the deceased. Subsequent steps necessary to be taken were left to her attorney. He was unable to determine the address of one of the heirs. The appellant herein, brother of deceased, stated to this attorney that he did not know anything about the heir and had not heard from him for ten years. The attorney was taken ill and confined to his home. However, during this time, efforts were being made to ascertain if this heir was living, and if so, his address. Appellant McClary states that he did not learn that Powers was dead until March 8, 1940. This was not until a month after appellee had filed her petition for probate of the will and for appointment as executrix. Another attorney acted in this regard for appellee at the instance of Mr. Green, who was then sick and unable to attend to business.

thereof Ch. 3, Sec. 211, Powers Act of 1901, and the fact that he is a resident of the county of the deceased person, shall either be a sufficient reason to allow or to disallow a proceeding to have the will admitted to probate in the proper county within thirty days after the admission of the will to probate. This section further provides that upon no other knowledge so to do, "except for good cause shown," the court "may" leave him the right to so act. In either case, we find that a discretion rests with the court in regard to such matters, and that under the present act, for good cause shown, the court may disregard the failure to observe a certain or to take steps to secure an order to probate a will within the time named. Appellate in this instance filed suit with the clerk of the probate court on the same day that it was taken from the safety deposit box of the deceased. Subsequent steps necessary to be taken were left to the attorney. He was unable to determine the address of one of the heirs. The appellant herein, brother of deceased, stated to this attorney that he did not know anything about the heirs and had not heard from him for ten years. The attorney was given ill and confined to his home. However, during this time, efforts were made to ascertain if the heirs was living, and if so, the address. Appellant McGowan states that he did not learn from Powers was sent until March 7, 1911. This was not until a month after appellant had filed her petition for probate of the will and for appointment as executrix. Further, appellant was in this regard for several months after the date of the will, and was then able to ascertain the whereabouts of the heirs.

It appears that such delay as occurred resulted from an attempt to locate the heir Powers and from the illness of appellee's attorney. The action of the Circuit Court in revoking the letters issued to the public administrator and granting letters to appellee rested largely within his discretion. He necessarily considered that the delay in the filing of appellee's petition was not such as to bar her of her right to be appointed executrix under the terms of the will, and that good cause was shown why her petition was not sooner filed. We do not think the trial court abused its discretion in this respect and its order and judgment is affirmed.

Judgment Affirmed.

It appears that such a trial is required and that an attempt to locate the heirs appears to be the first step in the appellant's attorney. The matter is now before the Court in view of the fact that the heirs have been located and the Court is granting letters to the appellant to appear within the time specified. It is necessarily concluded that the delay in the filing of the appellant's petition was due to the fact that the appellant was not aware of the fact that she had the right to be appointed administratrix of the estate of the decedent and that good cause was shown why the petition was not sooner filed. We do not think the trial court abused its discretion in this respect and the order and judgment is affirmed.

Respectfully,
Your obedient servant,
J. H. H. H.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

41156

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
JOHN S. RUSCH,

Appellee,

v.

OSCAR TUCKER, NICHOLAS DE FABIO, HYMAN
FEIGENBERG and EDITH GOLDFARB,

Appellants.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

308 I.A. 668²

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

A primary election was held in Chicago on April 12, 1938. The respondent Oscar Tucker served as a Republican judge in the 5th precinct of the 24th ward. Nicholas DeFabio was the remaining Republican judge. Myron Faier served as Democratic judge. Hyman Feigenberg and Edith Goldfarb were democratic and republican clerks respectively.

These proceedings were brought against the entire election board of the precinct under section 17 of the Primary Law (Ill. Bar Stats. Ch. 46, sec. 381). On February 16, 1939, a petition was filed in the County Court of Cook County by John S. Rusch, chief clerk of the Board of Election Commissioners. An order of court directed that all of the respondents be attached and committed to jail unless they gave bond in the sum of \$2,500 each. The order was entered ex parte without notice to respondents. The trial of the case was commenced on October 16, 1939. On that day, the respondents filed a verified petition praying that the cause be assigned to some judge other than Edmund K. Jarecki. This petition was denied. The court heard the testimony of twenty witnesses for the petitioner, including a handwriting expert. The parties entered into a stipulation concerning custody of the ballots from the time they were turned over to the Election Commissioners by the respondents. All of the respondents testified in their own behalf. On November 2, 1939, the court entered a judgment order, which found that the respondent Hyman Feigenberg assumed the duties of a judge during voting and during the canvass in place of Myron Faier who acted as clerk. Consequently the order found that Myron Faier had purged himself of contempt and he was discharged.

PEOPLE OF THE STATE OF ILLINOIS, et al.,
JOHN A. RUGER,

Appellee,

v.

OSCAR TUCKER, NICHOLAS DE WILDE, JIMMEN
FEEGENBERG and EDITH GOLDFARB,

Appellants.

MR. PRESIDING JUDGE NICHOLAS DE WILDE, et al.,

A primary election was held in Cook County on April 1, 1932.

The respondent Oscar Tucker served as a Republican judge in the 4th

precinct of the 4th ward, Nicholas De Wilde and the following Republican

Judge. Myron Fair served as Democratic judge. Myron Fair and

Edith Goldfarb were Democratic and Republican electors respectively.

These proceedings were brought against the entire election

board of the precinct under section 17 of the Election Law (Ill. Stat.

State, Ch. 46, sec. 101). On February 12, 1932, a petition was filed

in the County Court of Cook County by John A. Ruger, chief clerk of

the Board of Election Commissioners. In order of court approval that

all of the respondents be attached and committed to jail unless they

gave bond in the sum of \$1,500 each. The order was entered on

without notice to respondents. The trial of the case was commenced on

October 18, 1932. On that day, the respondents filed a verified

petition praying that the cause be assigned to some judge other than

Edmund K. Jarecki. This petition was denied. The court heard the

testimony of twenty witnesses for the petitioners, including a large

writing expert. The parties entered into a stipulation concerning

many of the details from the time they were turned over to the

Election Commissioners by the respondents. All of the respondents

testified in their own behalf. On November 1, 1932, the court entered

a judgment order, which found that the respondents Myron Fair and

assumed the duties of a judge during said election and during the entire time

place of Myron Fair who acted as clerk. Consequently the entire issue

that Myron Fair had argued himself at judgment and he was discharged.

3081A.668

He is not a party to this appeal. The judgment order found that the respondent, Edith Goldfarb, failed and refused to keep her tally sheet as required by law. The order found that all four of the remaining officials, judges and clerks alike, did: (1) permit or acquiesce in permitting persons to vote who were not registered in the precinct; (2) permit or acquiesce in permitting persons to vote who were not residents of the precinct; (3) knowingly make a false canvass. The judgment order also found that Oscar Tucker, Nicholas DeFabio and Hymen Feigenberg, did: (1) knowingly permit or acquiesce in permitting illegal alteration of official ballots; (2) knowingly assist or permit assistance to be given to voters without affidavits. Oscar Tucker, Nicholas DeFabio and Hymen Feigenberg were each sentenced to serve one year in the county jail, Edith Goldfarb was sentenced to pay a fine of \$500.00. If this fine was not paid, it was to be worked out at the rate of \$2.00 per day. It is from the above judgment order that these four respondents appeal.

It is contended by the respondents that the trial court erred in not holding himself disqualified from hearing the case, and that he should have assigned it to some other judge for trial. It appears from the record that on October 16, 1939, the respondents filed a verified petition praying that the cause be assigned to some other judge for trial. This motion was summarily overruled. By this motion and on appeal in this court, respondents do not contend that they were entitled to a statutory change of venue, but that the trial judge deprived them of a fundamental common law right by not holding himself disqualified from hearing this case. The petition for transfer of the cause filed in this case is similar to the petition filed in a number of other cases, and alleges the active role taken by the trial judge in politics. A transcript of a speech broadcast by the trial judge was appended to the petition as an exhibit. This talk showed the bitterness of feeling of the trial judge against the regular Democratic organization of Cook County, and -- as suggested by respondents -- is an example of the manner in which he participated in politics while he was hearing this

He is not a party to this appeal. The judgment against him was
respondent, Edith Goldfarb, failed and refused to pay her bill, which
as required by law. The other amount paid for the respondent
officials, judges and clerks, etc. (1) permit or assistance in
permitting persons to vote who were not entitled to vote; (2)
permit or assistance in permitting persons to vote who were not residents
of the precinct; (3) knowingly make a false statement. The judgment
order also found that Oscar Hymen, Hymen Goldfarb and Hymen Goldfarb
did: (1) knowingly permit or assistance in permitting illegal assistance
of official ballot; (2) knowingly assist in permit assistance in
given to voters without eligibility. Oscar Hymen, Hymen Goldfarb and
Hymen Goldfarb were each sentenced to serve one year in the county
jail, Edith Goldfarb was sentenced to pay a fine of \$500.00. If this
fine was not paid, it was to be worked out at the rate of \$5.00 per day.
It is from the above judgment order that Oscar Hymen, Hymen Goldfarb and
Edith Goldfarb appeal. It is contended by the respondents that the trial court error
in not holding himself disqualified from hearing the case, and that he
should have assigned it to some other judge for trial. It is contended that
the record that on October 10, 1939, the respondents filed a verified
petition praying that the case be assigned to some other judge for
trial. This motion was summarily overruled. By this motion and on
appeal in this court, respondents do not contend that they were entitled
to a statutory change of venue, but that the trial judge received notice
of a fundamental error in law right by not holding himself disqualified
from hearing this case. The petition for transfer of the venue filed
in this case is similar to the petition filed in a number of other cases,
and alleges the same facts known by the trial judge in this case. A
transcript of a speech made by the trial judge was presented to the
petition as an exhibit. This last showed the history of the
of the trial judge against the transfer jurisdiction of the
County, and -- as suggested by respondents -- is an example of the
manner in which he conducted his business while he was acting as

case and similar matters.

In passing upon this question, this court in its opinion in the case of People, ex rel Rusch v. Levin, Gen. No. 41386, said that one of the questions considered by this court in People ex rel Rusch v. Levin, 305 Ill. App. 142, was the motion of the respondents for a reassignment -- as stated in the petition -- "because of the fact that the County Judge was a candidate for nomination at the primary. Respondents alleged and offered to prove that the County Judge complained of the number of votes he received in the primary in the 24th ward, and in the 35th precinct of the 24th ward in particular, and that he said in substance he could not understand why in the 24th ward and in said precinct he did not receive more votes than were shown cast for him on face of return and could not understand the small number of votes he received in the ward and precinct in comparison with his opponents and in comparison with votes cast in other wards throughout the County * * * and further, that the County Judge expressed belief that the misbehavior of character described in the petition and amendment in fact occurred, thereby prejudging petitioners guilty." In the case cited (People, ex rel Rusch v. Levin, Gen. No. 41386, this court called attention to the case of People, ex rel Rusch v. Margaret Cunningham, et al., (Gen. No. 40896) where this court said;

"The record in the instant case discloses an unusual and novel situation. The trial judge was a candidate for renomination by his party at the same primary at which it is alleged respondents were guilty of misconduct. Their alleged acts of misbehavior directly affected his candidacy. It was charged that defendants as officials acquiesced in the conduct of persons who erased crosses on ballots in the square before the name of ~~him~~ the trial judge and made crosses in the square opposite the name of his opponent. It is manifest that the trial judge was intensely interested in these alleged actions. We have recited the facts, and comment, we think, is not required. There was no reason why the cases against these respondents should not have been tried by another judge. We hold the record shows he was disqualified."

In support of the conclusion reached a number of authorities were cited.

When we come to consider the instant case we find that the court in this instant case was interested in these alleged actions and, after due consideration, we feel that we will adhere to the conclusion and suggestions that were made by the court in People, ex rel Rusch v.

case and similar matters.

In question upon this matter, this court in its opinion in the case of People, ex rel. Jones v. Lewis, 100 Ill. App. 112, was the motion of the respondent for a writ of habeas corpus. The questions considered by this court in People, ex rel. Jones v. Lewis, 100 Ill. App. 112, was the motion of the respondent for a writ of habeas corpus. As stated in the petition -- "Because of the fact that the County Judge was a candidate for nomination at the primary, respondents alleged and offered to prove that the County Judge conspired with the number of votes he received in the primary in the 14th ward, and in the 14th precinct of the 14th ward in particular, and that he did in substance he could not and refused why in the 14th ward and in said precinct he did not receive more votes than were shown cast for him on basis of return and could not understand the small number of votes he received in the ward and precinct in comparison with his opponents and in comparison with votes cast in other wards throughout the County." It is not necessary that the County Judge expressed belief that the alleged conspiracy of respondents was in the petition and amendment in fact occurred, thereby bringing petitioners guilty." In the case cited (People, ex rel. Jones v. Lewis, 100 Ill. App. 112), this court called attention to the case of People, ex rel. Jones v. Hervey Campbell, et al., (Ill. App. 100, 100, 100) where this court said: "The record in the instant case discloses an unusual and novel situation. The trial judge was a candidate for nomination at the primary at the same time as when it is alleged respondents were guilty of misconduct. Their alleged case of alleged conspiracy brought his candidacy. It was charged that defendants on behalf of respondents in the conduct of persons who were named on petition to the court before the name of the trial judge was made known in the square opposite the name of his opponent. It is asserted that the trial judge was in fact interested in these alleged actions. The court has ruled the facts, and comments, in brief, in our opinion. There was no reason why the court could not have made a ruling and have been tried by another judge. We held the record shows no such situation." In support of the conclusion reached a number of suggestions were given. Then we come to consider the instant case as this case the court in this instant case was requested to make a ruling and, after due consideration, we feel that we will have to do the same and suggestions that were made by the court in People, ex rel. Jones v.

Cunningham, (supra). We believe under the circumstances that the respondents were entitled to have another judge assigned to try the acts alleged to have been committed. To consider further what was said in the People v. Cunningham case (supra), there it was said:

"The law books are full of cases both in England and in the United States where the most distinguished judges recusing themselves have refused to sit in cases where they might possibly be considered to have personal bias or interest. It is unnecessary to review the cases. As illustrating we cite In re. Neagle, 135 U. S. 99, where Mr. Justice Field did not sit at the hearing or take part in the decision, and Ill. Cent. R. R. Co. v. Illinois, 146 U. S. 476, where Chief Justice Fuller and Mr. Justice Blatchford likewise declined to take part in the case."

So, upon a consideration of the facts as we have them here, it is apparent that these respondents were entitled to have a judge hear their case who has no personal interest. The court having refused their petition for a reassignment, it will be necessary for this court to reverse the judgment order and remand the cause with directions that the case be assigned to another judge. For the reasons stated the judgment order is reversed with directions to assign this cause to some other judge as prayed for in the petition.

REVERSED AND REMANDED.

DENIS E. SULLIVAN AND BURKE, JJ. CONCUR.

Supplement, (supp.), to which under the circumstances that the respondents were entitled to have another judge assigned to try the case alleged to have been decided. The assigned judge who was said in the People v. Thompson case (supp.), there is no case:

"The law books are full of cases both in England and in the United States where the court distinguished judges meaning that they have refused to sit in cases where they will be compelled to follow the to have personal bias or interest. It is unnecessary to follow the case. As illustrating we cite in People v. Thompson, 180 N. Y. 20, where Mr. Justice Field did not sit at the hearing or take part in the decision, and People v. Thompson, 180 N. Y. 20, where Chief Justice Miller and Mr. Justice Thompson likewise declined to take part in the case."

So, upon a consideration of the facts as we have them here,

it is apparent that these respondents were entitled to have a judge hear their case who has no personal interest. The court having refused their petition for a recusal, it will be necessary for this court to reverse the judgment order and return the case with directions that the case be assigned to another judge. For the reasons stated the judgment order is reversed with directions to assign this case to some other judge as prayed for in the petition.

REVEREND AND HONORABLE

WILLIAM A. WILKIN AND WILKIN, JR. COUNSEL

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
JOHN S. RUSCH,

Appellee,

HENRY LEVIN, MINNIE HIRSCH, LILLIAN ROTHSTEIN,
BERTHA SCHALLMAN, JOSEPH ROSENFELD,

Appellants.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

308 I.A. 669

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

The respondents in the action before this court served as officials in the primary election held April 12, 1938, in the 36th precinct of the 24th ward in Chicago. On September 1, 1938, John S. Rusch, Chief Clerk of the Election Commissioners, filed a petition in the County Court of Cook County charging respondents with misconduct at the polls. A trial was had in that court, and on December 15, 1938, a judgment order was entered. The respondents were found guilty and punished by the following jail sentences: Henry Levin, judge, 18 months; Minnie Hirsch, judge, 6 months; Lillian Rothstein, judge, 6 months; Bertha Schallman, clerk, 3 months; and Joseph Rosenfeld, clerk, 3 months.

An appeal was taken to this court (Gen. No. 40671), wherein on October 25, 1939, the Third division of this Court filed an opinion reversing the judgment order and remanding the cause to the County Court. (People ex rel Rusch v. Levin, 305 Ill. App. 142).

On June 24, 1940, the County Court entered the judgment order herein appealed from. No new testimony was heard. The order recites that the court "reconsidered the evidence of the respective parties", and does not recite that the Court considered the opinion of this Court or the directions therein contained. Henry Levin was sentenced to serve one year in jail and to pay a fine of \$500.00. Minnie Hirsch and Lillian Rothstein, the remaining judges, were each fined \$500.00. Bertha Schallman and Joseph Rosenfeld, the two clerks, were each fined \$250.00. The order provides that upon failure of the respondents to pay the fines, they are to be jailed and the fines reduced at the rate of \$3.00 for each day spent in custody. The effect of this judgment order - - as contended by respondents - - is that in event the

PEOPLE OF THE STATE OF CALIFORNIA,
JAMES R. WILSON,

Defendant,

HENRY LAVIS, MINNIE WILSON, JAMES R. WILSON,
BERTHA SCHALIMAN, JOSEPH SCHALIMAN,

Plaintiffs.

MR. PRESIDING JUDGE WILSON, CLERK OF THE COURT:

The respondents in the action before this court were an
officials in the primary election held April 15, 1932, in the San
Precinct of the 24th ward in Oakland. On September 1, 1932, when

S. Wason, Chief Clerk of the Election Commission, filed a petition

in the County Court of Cook County charging respondents with misconduct
at the polls. A trial was had in that court, and on December 24, 1932,

a judgment order was entered. The respondents were found guilty and

punished by the following jail sentences: Henry Lavis, Judge, 12 months;
Minnie Wilson, Judge, 6 months; William Rothstein, Judge, 3 months;

Bertha Schaliman, Clerk, 3 months; and Joseph Schaliman, Clerk, 3 months.

An appeal was taken to this court (Docket No. 40571), wherein

on October 28, 1932, the Third Division of this court filed an opinion

reversing the judgment order and remanding the case to the County

Court. (People ex rel. Wason v. Lavis, 220 Cal. 142.)

On June 24, 1933, the County Court entered the judgment order

again appealed from. No new testimony was heard. The court decided

that the court "reconsidered the evidence of the respondents' guilt,"

and does not recite what the court considered was evidence of said counts

or the directions therein contained. Every count was remanded to county

one year in jail and to pay a fine of \$250.00. Minnie Wilson was

William Rothstein, the presiding judge, was found guilty of

Bertha Schaliman and Joseph Schaliman, the two clerks, were each found

\$250.00. The order provides that upon failure of the respondents to

pay the fines, they are to be jailed and not more reduced is the rate

of \$2.00 for each day spent in custody. The effect of this judgment

order - - as contended by respondents - - is that in every the

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respondents are unable to pay the fines, they are to be incarcerated for virtually the same periods as provided in the original sentence: Henry Levin, 17 months and 15 days; Minnie Hirsch and Lillian Rothstein, each, 5 months and 15 days; Bertha Schallman and Joseph Rosenfeld, each, 2 months and 21 days. No point is raised on the pleadings, and this appeal is intended to review the sentence imposed on respondents by the County Court.

In the opinion of the Court in People ex rel Busch v. Levin, 305 Ill. App. 142, this court considered the punishment that was inflicted, and found that Harry Levin was sentenced to a greater punishment than for a violation of the act providing for assistance to voters. Punishment for such criminal violation is not to exceed one year imprisonment, or a fine not to exceed \$2,000, or both, and as said by the court in that opinion "and we believe under the circumstances in this case that such punishment was clearly excessive, in view of the provision of the statute which should have been taken into consideration in inflicting this punishment." This court there further said, "As to the two judges Minnie Hirsch and Lillian Rothstein, the punishment of six months in the county jail, since these persons bear a good reputation, is excessive, in view of all the facts and circumstances in the case, and this applies with equal force to the clerks of election, Bertha Schallman and Joseph Rosenfeld, who were sentenced to 90 days. While it is true the judge of the ^{county} court has the right to inflict punishment such as he believes is justified by the record, still this punishment was not proportioned to the acts charged." For the reasons stated, the judgment was reversed and remanded for the purpose of fixing punishment as justified by the record.

Again, the matter is on appeal from the judgment order entered by the County Court. We have before us the entire record involved in these two appeals. One of the questions considered by this court was the motion of respondents which -- as stated in their petition -- the County Judge was a candidate for nomination at the Primary. Respondents alleged and offered to prove that the County Judge complained of the

number of votes he received in the primary in the 24th ward, and in the 35th precinct of the 24th ward in particular, and that he said in substance he could not understand why in the 24th ward and in said precinct he did not receive more votes than were shown cast for him on face of returns and could not understand the small number of votes he received in the ward and precinct in comparison with his opponent and in comparison with votes cast in other wards throughout the county; and further in his opinion to accomplish results of which he complained it would have been necessary for the Election Board in precincts in the 24th ward including the 35th to be guilty of misconduct and misbehavior of character described in petition and amendment herein filed on which order to show cause was predicated; and further, that the County Judge expressed belief that the misbehavior of character described in the petition and amendment in fact occurred, thereby prejudging petitioners guilty.

Upon a like question as before the court in the instant case, this court in the case entitled People ex rel. John S. Busch v. Margaret Cunningham, et al., (Gen. No. 40896) in an opinion filed on the 20th day of January, 1941, said:

"The record in the instant case discloses an unusual and novel situation. The trial judge was a candidate for renomination by his party at the same primary at which it is alleged respondents were guilty of misconduct. Their alleged acts of misbehavior directly affected his candidacy. It was charged that defendants as officials acquiesced in the conduct of persons who erased the crosses on ballots in the square before the name of the trial judge and made crosses in the square opposite the name of his opponent. It is manifest that the trial judge was intensely interested in these alleged actions. We have recited the facts, and comment, we think, is not required. There was no reason why the cases against these respondents should not have been tried by another judge. We hold the record shows he was disqualified."

In support of the conclusions reached by the court, the following cases were cited as authorities: Moses v. Julian, 45 N. H. 52; Regina v. The Justices of Suffolk, Eng. Law & Equity Reports, Vol. 14, p. 90; Dimes v. Grand Junction Canal Co., Eng. Law & Equity Reports, Vol. 16, p. 63; and Schmidt, et al. v. United States, 115 Fed. (2d) 394. This court further said:

"The law books are full of cases both in England and in the United States where the most distinguished judges recusing themselves have refused to sit in cases where they might possibly be considered to have personal bias or interest. It is unnecessary to review the cases. As illustrating we cite In re, Neagle, 135 U. S. 99, where Mr. Justice Field did not sit at the hearing or take part in the decision, and Ill. Central R. R. Co. v. Illinois, 146 U. S. 476, where Chief Justice Fuller and Mr. Justice Blatchford likewise declined to take part in the case.

"Because the trial judge was a candidate for office at the primary in which these respondents are charged to have committed offenses and was therefore personally interested, the judgments against them will be reversed and their causes remanded with directions that the same be assigned for trial to another judge."

In the instant appeal, we will apply the reasoning and conclusion of the Court in the above cited case upon the question as to whether the respondents are entitled to have another judge assigned to try the acts that are alleged to have been committed by respondents. We feel that the conclusion reached is a proper one.

On the question as to whether the punishment was excessive, we believe that the court in fixing the punishment of the several respondents by its order, which is here appealed from, still fixed excessive punishment, and we adhere to what was said in that regard in the opinion of this court in the case of People, ex rel. Busch v. Levin, 305 Ill. App. 142.

For the reasons stated the judgment is reversed with directions that the cause be assigned to some other judge to hear and determine the questions involved.

AND REMANDED.
REVERSED/WITH DIRECTIONS.

DENIS E. SULLIVAN AND BURKE, JJ. CONCUR.

[illegible]

In the instant appeal, we will apply the reasoning and conclusion of the Court in the above cited cases upon the question as to whether the respondents are entitled to have another hearing to try the case that was alleged to have been omitted or remanded. We feel that the conclusion reached is a proper one.

On the question as to whether the punishment was excessive, we believe that the court in fixing the punishment of the respondent by its order, which is now before you, still gives excessive punishment, and we think he should be held in local prison in the opinion of this court in the case of Levin, ex rel. Levin.

For the reasons stated the judgment is reversed with directions that the case be assigned to some other judge to hear and determine the questions involved.

AND REMANDED.

FUNDING OF THE NAVY, 1910-1911

41399

HALLIE E. McCOWAN,

Plaintiff - Appellee,

v.

DON C. McCOWAN, et al.,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

308 I.A. 669²

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

The action here on appeal is one filed by the plaintiff for separate maintenance and wherein the defendant filed a counter-claim for divorce. The plaintiff, prior to the filing of the counterclaim for divorce, made a motion for temporary alimony and solicitor's fees, which motion was denied. There was a preliminary hearing upon the counterclaim for divorce, and thereafter, the matter was referred to a special commissioner for the purpose of determining the circumstances, income and assets of the parties. Evidence was heard before the commissioner and his report was filed and approved by the court. Thereafter, a motion was made by the plaintiff for the allowance of temporary alimony and solicitor's fees, which motion was allowed, and an order was entered on March 5, 1940, upon the defendant to pay to the plaintiff \$20.00 per week during the pendency of this suit and temporary solicitor's fees in the amount of \$1500.00, from which order this appeal is taken. Subsequently, on December 1, 1939, the defendant filed an amended complaint for divorce, and the cause was thereafter heard upon the merits and a decree entered on July 3, 1940, dismissing the plaintiff's complaint and the defendant's counterclaim for want of equity, the decree specially reserving the matters contained in the order of March 5, 1940, which provided for temporary alimony of \$20.00 per week and temporary solicitor's fees of \$1500.00.

The defendant, Don C. McCowan contends that the effect of the final judgment entered in the cause, pending the appeal, on July 3, 1940, dismissing the cause for want of equity, abrogated the provisions of the order of March 5, 1940, appealed from herein, for temporary alimony,

WILLIE J. MOORE

Plaintiff - Defendant

v.

JOHN C. MOORE, JR.

Defendant - Plaintiff

3081A 669

IN REPLY TO THE ORDER OF THE COURT IN THE MATTER OF:

The action here on appeal is the first by the Plaintiff for separate maintenance and support and the second by the Plaintiff for divorce. The Plaintiff, prior to the filing of the summons for divorce, made a motion for temporary alimony and attorney's fees, which motion was denied. There was a preliminary hearing held on the counterclaim for divorce, and thereafter, the wife was ordered to pay special commissioner for the purpose of determining the circumstances, income and assets of the parties. Following the hearing and testimony, her and his report was filed and approved by the court. Thereafter, a motion was made by the Plaintiff for the allowance of temporary alimony and attorney's fees, which motion was denied, and no order was entered on March 8, 1940, upon the delinquent to pay the Plaintiff \$100.00 per week during the pendency of this suit and temporary alimony's fees in the amount of \$100.00, from which order was entered as above, and, accordingly, on December 1, 1939, the defendant filed an answer and counterclaim for divorce, and the court was thereupon heard on the matter and a decree entered on July 1, 1940, dismissing the Plaintiff's counterclaim and the defendant's counterclaim for lack of equity, and the court, reserving the matters involved in the order of March 8, 1940, which provided for temporary alimony of \$100.00 per week and temporary attorney's fees of \$100.00.

The defendant, John C. Moore, Jr., before entering the order of the final judgment entered in the matter, remaining the court, on July 1, 1940, dismissing the cause for lack of equity, requested the provision of the order of March 8, 1940, be made then entered, for temporary alimony,

solicitor's fees and Commissioner's costs, and as to all amounts past due and uncollected thereunder, and rendered the said order unenforceable. The defendant further suggests that it is the well settled principle in the law, that an adjudication by a court having jurisdiction of the subject matter and the parties is final and conclusive not only as to matter actually determined, but as to every other matter which the parties have litigated as incident thereto within the legitimate purview of the subject matter of the action; and further submits that where there is an interlocutory order to pay temporary alimony, costs, and solicitor's fees, and a final decree dismissing the complainant's bill for separate maintenance is entered, and which omits or is silent as to the enforcement of any interlocutory orders entered prior to said final decree, all such interlocutory orders as a matter of law merge in the final decree having no longer any force and effect. A number of authorities are cited on this question, one of which is the case of Chestnut v. Chestnut, 77 Ill. 346, where the court in denying a wife the right to recover accrued moneys due under an order for temporary alimony in a proceeding after the bill for divorce was dismissed, said (p. 349);

"But aside from this view, upon principle, it would appear the dismissing of the bill would operate to revoke the order allowing temporary alimony. Such a provision is for her immediate support, and to enable her to meet the expenses of her defense pending the litigation. When the bill was dismissed, the husband's common law liability to support his wife was revived, and the necessity for alimony did not exist. It will be presumed he discharged his obligation in that regard; at all events the liability remained, and it would be oppressive to impose upon him the payment of an additional sum deemed sufficient to support her if living separate and apart from him."

The defendant concludes by saying that by reason of the entry of the final judgment dismissing the cause for want of equity, the parties hereto are still husband and wife, and therefore, there is no ground for separate maintenance, and alimony payments and solicitor's fees are unnecessary.

In answer to the suggestions made by the defendant, with which the plaintiff does not agree, the plaintiff urges that the argument and contention of defendant's counsel, under proposition I of appellant's brief, cannot be reconciled with the record in this case. The decree --

as suggested by plaintiff -- does not omit nor is it silent as to the enforcement of the order of March 5, 1940, but in fact specifically retains jurisdiction for the enforcement of that order. Also, this proceeding is not a separate suit to collect the amount due under that order. From the facts it appears that the allowance of temporary alimony and solicitor's fees granted, was not for the support of plaintiff during the pendency of plaintiff's suit for separate maintenance nor for attorney's fees to carry on that action, but -- as argued by plaintiff-- was for the purpose of providing plaintiff with support and suit money pending the disposition of the defendant's counterclaim for divorce and for solicitors fees to enable her to properly defend the defendant's counterclaim. The counterclaim was filed December 28, 1938, and the cause was thereafter referred to a special commissioner to determine the status and means of the parties. Before the special commissioner's report was filed and approved, a preliminary hearing upon defendant's counterclaim for divorce was held before Judge Desort. After the special commissioner's report was filed and approved, Judge Lewé acted upon the motion of plaintiff for temporary alimony and solicitor's fees and entered the order of March 5, 1940. Thereafter, as appears from the decree, entered on July 3, 1940, both the complaint and counterclaim were dismissed for want of equity and jurisdiction retained over the matters contained in the order of March 5, 1940. It must, of course, be admitted that it is the law of this state both by statute and decisions of our courts, that the wife is entitled to temporary alimony for her support during the pendency of a counterclaim for divorce by her husband and for temporary solicitors fees to defend such action, provided that after a preliminary hearing by the court upon the counterclaim for divorce, the court is of the opinion that it is reasonably probable that the husband can not sustain his charges. (Ill. Rev. Stat. 1939, Ch. 40, sec. 16). When the defendant filed his counterclaim for divorce, the wife was entitled to an allowance for support in carrying on the suit regardless of the sufficiency of her complaint.

[illegible]

The order entered before Judge O'Connell on December 19, 1938, denying the plaintiff's motion for temporary alimony and solicitor's fees is urged by defendant as being res adjudicata of plaintiff's rights to temporary alimony and solicitors fees at any subsequent time during the pendency of the suit, and that the order of March 5, 1940, was therefore in violation of the order of December 19, 1938. We are unable to agree with this suggestion of defendant, for, at the time of the entry of the order of December 19, 1938, upon plaintiff's motion for temporary alimony and solicitor's fees, only the plaintiff's complaint for separate maintenance was on file. Subsequently, on December 1, 1939, the defendant filed his amended counterclaim for divorce. When we come to consider this fact, together with all the facts in the case, the provisions of the order of March 5, 1940, fixing temporary alimony and solicitor's fees were proper.

The special commissioner filed his report in conformity with the order of reference and the statute. It is provided by Ill. Rev. Stat. 1939, Ch. 68, sec. 22, that the court in a matter of this kind may refer the cause to a "Special Commissioner to take and report evidence with reference to the condition in life of the parties and their circumstances, with or without the Master's or Commissioner's conclusions thereon." From the record it appears that the special commissioner filed his report showing the condition in life of the parties and their circumstances and his conclusions based upon such evidence with regard to the amounts which would be proper for temporary alimony and solicitor's fees. Plaintiff contends that no proper objections to this report by the defendant appear in the record. The conclusion of the special commissioner as to what would be a reasonable amount for temporary alimony and solicitor's fees, if such were improper, is merely advisory. The allowance of temporary alimony and solicitor's fees was made by the court, and the fact that the court entered an order allowing the amounts, which the special commissioner had concluded were reasonable, in no way detracts from its authority or jurisdiction but in effect affirms the fact that the court was itself of the opinion

that the amounts of such allowances were proper. The order that was entered by the court provided;

"It is further Ordered, Adjudged and Decreed upon full hearing that the defendant . . . pay to . . . plaintiff, the sum of Twenty (\$20.00) per week beginning March 4, 1940, as and for temporary alimony pending this suit and a further sum of Fifteen Hundred Dollars (\$1500.00) for temporary solicitor's fees, pursuant to the Statute made and so provided, instanter."

From this order it would appear that the temporary alimony was allowed and payable "pending this suit", and as the suit has been dismissed as suggested, the defendant would be required to pay this temporary alimony up until the time of the dismissal decree, entered on July 3, 1940.

It is apparent, from the report of the special commissioner, that the court, in fixing the amount of temporary alimony and solicitor's fees, considered the ^{evidence} ~~the/xxxxx~~ and circumstances as they appeared in the record in reaching the conclusion that was reached. We are of the opinion that the special commissioner did not in any way exceed his authority so as to divest the court of jurisdiction to enter an order allowing temporary alimony and solicitor's fees. It is suggested by defendant that the special commissioner's report is contingent in that it is advisory. The court had jurisdiction over the parties and the subject matter and had authority under the statute to enter an order pendente lite for temporary alimony and solicitor's fees. We are of the opinion that it was proper for the court to enter an order for temporary alimony which would require the defendant to pay the amount of the allowance up to the time of the disposition of the suit.

As to the matter of the amount that was allowed for solicitor's fees in the sum of \$1500.00, the defendant claims the allowance to be excessive. The special commissioner's report disclosed that the defendant was worth approximately \$30,000.00, with an annual income of \$10,000.00, and that the assets of the plaintiff were not in excess of \$1,000.00. As suggested by plaintiff, it was, of course, proper for the court to make an allowance for past services rendered by plaintiff's attorneys in contesting the defendant's counterclaim, where it appears that such allowance is necessary for the continued defense of the counterclaim.

that the amount of such allowance was shown. The court said that
entered by the court provided;
"It is further ordered, that the defendant pay to the plaintiff the sum of twenty
(\$20.00) per week beginning March 1, 1934, and the temporary allowance
pending this suit and a further sum of \$100.00 per week beginning March 1, 1934,
for temporary alimony, until the court orders otherwise."
from this order it would appear that the temporary alimony was allowed
and payable "pending this suit", and as the suit was not dismissed as
suggested, the defendant would be required to pay said temporary alimony
up until the time of the dismissal hearing, ordered on July 7, 1934.
It is apparent, from the report of the local commissioner,
that the court, in fixing the amount of temporary alimony and alimony,
evidence
there, considered the xxxxx and circumstances as they appeared in the
record in reaching the conclusion that was reached. The use of the
opinion that the special commissioner may not in any way restrict his
authority so as to divest the court of jurisdiction to enter an order
allowing temporary alimony and alimony's term. It is suggested by
defendant that the special commissioner's report is confidential in that
it is advisory. The court had jurisdiction over the parties and the
subject matter and had authority under the statute to enter an order
pendente lite for temporary alimony and alimony's term. It is of the
opinion that it was proper for the court to enter an order for temporary
alimony which would require the defendant to pay the amount of two
allowance up to the time of the dismissal of the suit.
As to the matter of the amount that was allowed for alimony,
there in the sum of \$100.00, the defendant claims her allowance to be
excessive. The special commissioner's report disclosed that the
defendant was worth approximately \$2,000.00, with no real income of
\$10,000.00, and that the needs of the family were not in excess of
\$1,000.00. As suggested by plaintiff, it was, of course, proper for
the court to make an allowance for such expenses suggested by plaintiff's
attorneys in contesting the defendant's commission, which is common
that such allowance is necessary for the reasonable defense of the
counterclaim.

The defendant contends that Judge Lewe heard no evidence with reference to the allowance of temporary solicitor's fees, and that he merely followed the recommendations of the special commissioner who had no authority or jurisdiction to inquire into the matter -- that the court followed the recommendation of an investigation made out of court, which it had no jurisdiction to do. It is to be noticed, however, from the order of March 5, 1940, that the order was entered upon a "full hearing". There was also before the court the report of the special commissioner with the evidence that was heard by him attached thereto, which evidence is not in the record on appeal, and, therefore, is not before this court. It is well to consider that the court entered the order upon a full hearing, and there being no evidence in the record on this question, this court will presume that there was evidence there justifying the court in fixing the solicitor's fees at \$1500.00.

Upon the rule as announced, in the case of People, ex rel Mehan v. Mehan, 198 Ill. App. 300, the Appellate court held that where nothing but the order in divorce proceedings allowing solicitor's fees is before the court, in the absence of any evidence to the contrary, the court must presume that the chancellor believed the wife to have a probable cause of action and that the payment of such fees, whether for past services or for future services, was necessary to enable the wife to maintain her action. So when we come to look into this record, we find that the court had a full hearing on the question and the evidence that was heard by the court is not in the record. We believe the only course this court should follow is to presume that evidence was heard which justified the allowance. The rule, as applied by this court on the question before us, was before the Supreme court in the case of Ernst, Exrs., v. Schmitz, Exr., 207 Ill. 604, where the court said;

"The findings of the master and chancellor are challenged on the ground that they find no support in the evidence. On looking into the record we find that all the evidence upon which the master and chancellor based their findings of fact has not been incorporated into the record, by certificate of evidence or otherwise. The findings of fact contained in the master's report and the decree

The defendant contends that Judge Lane heard no evidence with reference to the affidavit of defendant's lawyer, and that he merely followed the recommendation of the special commissioner who had no authority or jurisdiction to introduce into the record the court followed the recommendation of an investigating officer of the court, which it had no jurisdiction to do. It is to be noted, however, from the order of March 5, 1928, that the court was not asked to make a "full hearing". There was also before the court the report of the special commissioner with the evidence that was heard by his witness, therefore, which evidence is not in the record on appeal, and, therefore, is not before this court. It is well to remember that the court entered the order upon a full hearing, and there being no evidence in the record on this question, this court will presume that there was evidence there justifying the court in fixing the solicitor's fee at \$1000.00. Upon the rule as announced, in the case of Smith v. Smith, 1928 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

justified the court in entering the decree which it did, and all the evidence upon which such findings were based not being before this court, it will be presumed the evidence heard below was ample to sustain the findings. Allen v. Henn, 197 Ill. 486."

As we have already stated, it appears that the court had a full hearing and that not all of the evidence has been incorporated in the record, and this court must presume that evidence was heard justifying the entry of the order.

On the question of the allowance of \$280.00 to the special commissioner for his fees, defendant contends that such allowance is excessive and without jurisdiction on the part of the court. Chapter 68, sec. 22, Ill. Rev. Stats., 1939, provides that the commissioner shall be allowed "a fee of not to exceed Ten Dollars (\$10.00) per day for each day necessarily consumed in conducting and reporting the result of such investigation." The special commissioner in the present case put in 28 hours of time culminating in his report. The court allowed him \$10.00 per hour instead of \$10.00 per day. This is in error for the statute, above called attention to, provides for "a fee of not to exceed Ten Dollars (\$10.00) per day * * *." Assuming five hours to be considered as the usual court day, and the time spent by the commissioner to be 28 hours, under the statute the allowance should be for five days and three hours. Therefore, he would be entitled to \$56.00 for the services that were rendered in conducting and reporting the result of the investigation referred to him.

Having considered the facts and evidence and the law, the order of March 5, 1940, is affirmed as to the allowance of temporary alimony and solicitor's fees, and reversed as to the allowance of fees to the special commissioner and remanded with directions that the court tax the special commissioners fees in the amount of \$56.00.

AFFIRMED IN PART AND REVERSED IN PART,
AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN AND BURKE, JJ. CONCUR.

Justified the court in ordering the witness to be sworn in and all the witness upon which the finding was based was sworn in before this court, it will be presumed the witness stated the truth to sustain the finding. Allen v. Allen, 117 Ill. 202.

As we have already stated, it appears that the court did not believe and that not all of the evidence was being introduced in the record, and this court must presume that evidence was being introduced in entry of the order.

On the question of the allowance of \$250.00 in the special commissioner for his fees, defendant contends that such allowance is excessive and without justification on the part of the court. People v. 88, sec. 22, Ill. Civ. Stat., 1907, provides that the commissioner shall be allowed "a fee of not to exceed ten dollars (\$10.00) per hour for each day necessarily consumed in conducting and completing the results of such investigation." The special commissioner in the present case put in 28 hours of time conducting his investigation. The court allowed him \$10.00 per hour instead of \$10.00 per day. This is in error for the statute, above cited, provides for a fee of not to exceed ten dollars (\$10.00) per day. "Twenty-five cents to be considered as the usual county day, and the time spent by the commissioner to be 28 hours, under the statute the allowance should be for 28 days and three hours. Therefore, he would be entitled to \$250.00 for his services that were rendered in conducting and completing the results of the investigation referred to him.

Having considered the facts and evidence and the law, the court of March 6, 1940, is advised as to the allowance of defendant's attorney and solicitor's fees, and provided as to the allowance of fees for the special commissioner and counsellor with instructions that the court pay the special commissioner's fee in the amount of \$250.00.

ENTERED IN COURT AND FORWARDED IN COURT
AND FORWARDED WITH INSTRUMENTS

EMIL A. SCHLIVAN AND SONS, ATTORNEYS.

41482

JOHN W. ELLIS,

v. Appellant,

MARKET TOWN COMPANY, a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

308 I.A. 670

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an action instituted by John W. Ellis against Market Town Company, a corporation, for the recovery of \$400.80, said sum being in payment of certain refrigerators installed in the premises located at 6323-29 South Kedzie Avenue, Chicago. The defendant admitted the obligation, but by way of counter-claim alleged that plaintiff was indebted to said defendant in the sum of \$1077.96. There was a trial by the court resulting in a judgment against plaintiff in the sum of \$677.16, and it is from this judgment that plaintiff appeals.

The facts as they appear in the briefs of the parties are that on January 10, 1939, the Market Town Co., a corporation, defendant, verbally agreed to reimburse John W. Ellis, plaintiff, in the sum of \$400.80 in payment of certain refrigerators installed in the premises heretofore mentioned, and defendant agreed to assume the balance due R. Cooper Jr., Inc., in the sum of \$1,000.00 on said refrigerators. That on January 18, 1939, the said verbal agreement was incorporated in a certain real estate sale contract affecting said premises, entered into between Market Town Co., a corporation, defendant herein, as the purchaser, and one Frances Annas, as the seller, which contract provided among other things;

"Purchaser assumes the ice-box contract heretofore entered into between John W. Ellis and R. Cooper Jr. Inc. on which \$400.80 has been heretofore paid, and there remains to be paid on March 1, 1939, a balance of \$1,000.00, or the contract changed to the deferred payment plan. John W. Ellis will be reimbursed for the \$400.80 by the purchaser the torrens office waives the unpaid taxes with the reduced penalties, with money furnished by the purchaser.

"John W. Ellis, in consideration of this concession, agrees to render his personal services without additional charge in obtaining the tax reductions, i. e. he agrees to handle the securing of tax reductions without any charge.

It appears that subsequent to January 10, 1939, the date of the verbal agreement, John W. Ellis rendered his personal services without

THE UNIVERSITY OF CHICAGO

17. Stage 1

FRANCIS W. TERRY

1910

073.41808

MR. PRESIDING JUDGE: (Muffled) THE COURT IS IN SESSION.

This is an action involving the estate of John J. ...

Top Secret, for the security of the

being in payment of certain subscription in the year

14-00000

the obligation, but by way of counter-claim allowed in it.

100-443887-1000

trial by the court resulting in a judgment against the defendant in the sum of \$100.00.

10 0575.06 and 11 11 575.06

The photo is very close to the subject of the matter.

that on January 10, 1969, the subject was in a conversation with

verbally a need to release him from the hospital.

400.80 is amount of cash in bank

THE FOLLOWING INFORMATION IS FOR YOUR INFORMATION ONLY. IT IS NOT TO BE USED FOR ANY OTHER PURPOSE.

Cooper Jr., Inc. is an equal opportunity employer.

That on January 18, 1939, the said report was inspected by

IN A CERTAIN CASE, THE COURT HAS DECIDED THAT THE

Info between Market Town Co., a common fund, and the

STANDARD OF THE

* Archival reference file 100-106789

Info between John and [redacted]

has been harvested and there is a possibility of a

1938, a balance of \$1,000.00 was carried over from the previous year.

the purchase of the property.

reduced penalties, with money furnished by the government.

"John A. Hill, in connection of this newspaper, writes

to render his services to the Government of the United States.

...the case of the ...

| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 | 2024 | 2025 | 2026 | 2027 | 2028 | 2029 | 2030 | 2031 | 2032 | 2033 | 2034 | 2035 | 2036 | 2037 | 2038 | 2039 | 2040 | 2041 | 2042 | 2043 | 2044 | 2045 | 2046 | 2047 | 2048 | 2049 | 2050 | 2051 | 2052 | 2053 | 2054 | 2055 | 2056 | 2057 | 2058 | 2059 | 2060 | 2061 | 2062 | 2063 | 2064 | 2065 | 2066 | 2067 | 2068 | 2069 | 2070 | 2071 | 2072 | 2073 | 2074 | 2075 | 2076 | 2077 | 2078 | 2079 | 2080 | 2081 | 2082 | 2083 | 2084 | 2085 | 2086 | 2087 | 2088 | 2089 | 2090 | 2091 | 2092 | 2093 | 2094 | 2095 | 2096 | 2097 | 2098 | 2099 | 2100 |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 | 2024 | 2025 | 2026 | 2027 | 2028 | 2029 | 2030 | 2031 | 2032 | 2033 | 2034 | 2035 | 2036 | 2037 | 2038 | 2039 | 2040 | 2041 | 2042 | 2043 | 2044 | 2045 | 2046 | 2047 | 2048 | 2049 | 2050 | 2051 | 2052 | 2053 | 2054 | 2055 | 2056 | 2057 | 2058 | 2059 | 2060 | 2061 | 2062 | 2063 | 2064 | 2065 | 2066 | 2067 | 2068 | 2069 | 2070 | 2071 | 2072 | 2073 | 2074 | 2075 | 2076 | 2077 | 2078 | 2079 | 2080 | 2081 | 2082 | 2083 | 2084 | 2085 | 2086 | 2087 | 2088 | 2089 | 2090 | 2091 | 2092 | 2093 | 2094 | 2095 | 2096 | 2097 | 2098 | 2099 | 2100 | |

It appears that the above information is correct.

[illegible]

additional charge in obtaining the tax reductions as disclosed by his testimony and the testimony of Stephen Grilly. That tax reductions were obtained and that the Torrens office waived the objections as to unpaid taxes and reduced penalties.

The defendant admits the verbal agreement of January 10, 1939, with the plaintiff, and admits that defendant agreed to assume the obligations of the plaintiff under a contract for the purchase of said refrigerators and to reimburse plaintiff in the sum of \$400.80. There appears to be no dispute or contradictory evidence relating to said verbal agreement. The plaintiff calls our attention to the only point -- as he contends -- which the defendant attempts to raise in its counter-claim and by evidence is that by virtue of the said real estate contract entered into on or about January 18, 1939, incorporating said verbal agreement, John W. Ellis, the plaintiff, had agreed to secure certain tax reductions and penalties thereon levied and assessed against said premises at 6323-29 South Kedzie Avenue. It appears from the pleadings and evidence that John W. Ellis was not a party to said real estate contract. Furthermore, the provision contained in said real estate contract merely provides that John W. Ellis agrees to render his personal services in obtaining the tax reductions without charge.

The defendant attempts to support its contention through the testimony of Stephen Grilly and Richard P. Hummer. From the examination of Stephen Grilly it appears that he was acting as the attorney for the defendant; that he entered into a contract with the defendant relative to the services, to be rendered in procuring the tax reductions, and the fees for such services; that he was acting by virtue of a power of attorney obtained from the defendant, and that he had no agreements or understanding with John W. Ellis, plaintiff; that plaintiff produced certain reports and data for defendant in order to assist in the procurement of said tax reductions, and assisted him in taking the necessary legal steps in order to bring about the desired results. The plaintiff contends that the only other witness which defendant had to support its contention was Richard P. Hummer,

additional charge in obtaining the tax reductions as disclosed by his testimony and the testimony of Stephen Trilly. That the reductions were obtained and that the Torrens office waived the objections as to unpaid taxes and reduced penalties.

The defendant admits the verbal agreement of January 10, 1935, with the plaintiff, and admits that defendant agreed to perform the obligations of the plaintiff under a contract for the payment of said retrogrators and to reimburse plaintiff in the sum of \$100,000. It appears to be no dispute or contradictory evidence relating to this verbal agreement. The plaintiff calls our attention to the only point -- as he contends -- which the defendant attempts to raise in its contract claim and by evidence is that by virtue of the said verbal contract entered into on or about January 10, 1935, incorporation said verbal agreement, John F. Trilly, the plaintiff, had agreed to return certain tax reductions and penalties for the plaintiff and promised plaintiff said premises at 6383-22 North Leslie Avenue. It is true that the plaintiff and evidence that John F. Trilly was not a party to said verbal contract. Furthermore, the provision contained in said verbal contract merely provides that John F. Trilly agrees to render his personal services in obtaining the tax reductions without charge. The defendant attempts to support its contention through the testimony of Stephen Trilly and Richard L. Hunter. From the examination of Stephen Trilly it appears that he was acting as the attorney for the defendant; that he entered into a contract with the defendant relative to the services, to be rendered in obtaining the tax reductions, and the fees for such services; that he was acting as a party of a power of attorney obtained from the defendant, and that he had no agreement or understanding with John F. Trilly, plaintiff; that plaintiff produced certain reports and data for defendant in order to assist in the procurement of said tax reductions, and executed the same in taking the necessary legal steps in order to obtain the desired results. The plaintiff contends that the only other witness which defendant had to support its contention was Richard L. Hunter,

a member of the law firm representing the defendant. It appears from the pleadings that he signed the affidavit to the pleadings filed on behalf of defendant, and from the witness' testimony it was disclosed that there was a verbal agreement entered into on January 10, 1939, in the presence of Peter Ellis, also known as Peter J. Ellis, an officer of the defendant corporation.

To summarize his argument, plaintiff calls the court's attention to the following facts: (1) That John W. Ellis never contracted to reduce the taxes to any specific amount on the premises at 6323-29 South Kedzie Avenue, Chicago, Illinois, but merely agreed to render his personal services in that regard; (2) That John W. Ellis was not a party to the real estate contract for the sale of the premises at 6323-29 South Kedzie Avenue, Chicago; (3) that the testimony of Stephen Crilly, witness for the defendant, supports plaintiff's contention that he did not engage or employ Stephen Crilly, and that plaintiff rendered valuable services to assist in the reduction of taxes and penalties; (4) that although Peter Ellis (an officer of the Market Town Company) was present at the office of Mr. Richard P. Hummer at the time when the verbal agreement was entered into on, to-wit, January 10, 1939, he was not called as a witness to testify to the facts in question, nor was any other witness called on behalf of the defendant in support of its contention; and (5) that the court based its decision and judgment in this matter solely upon the testimony of Richard P. Hummer who is one of the attorneys of record for the defendant and has executed the various affidavits affixed to the pleadings of record, as attorney for said defendant.

The plaintiff contends that the trial court erred in basing its findings and rendering its judgment in favor of the defendant on the testimony of Richard P. Hummer, one of the attorneys for the defendant and counter-claimant, and suggests that under the authorities of this state it was an unethical act for Richard P. Hummer to testify as a witness in this case, and the trial court was duty bound to give but little, if any, credence to his testimony. Plaintiff points to the

a member of the law firm representing the defendant. It appears from the findings that he signed the affidavit to the complaint filed on behalf of defendant, and from the witness' testimony it was disclosed that there was a verbal agreement entered into on January 10, 1930, in the presence of Peter Ellis, also known as Peter J. Ellis, an attorney of the defendant corporation.

To summarize his argument, plaintiff calls the court's attention to the following facts: (1) That John J. Ellis never agreed to reduce the taxes to any specific amount on the premises at 8823-29 South Kedzie Avenue, Chicago, Illinois, but merely agreed to render his personal services in that regard; (2) That John J. Ellis was not a party to the real estate contract for the sale of the premises at 8823-29 South Kedzie Avenue, Chicago; (3) That the testimony of Stephen Grilly, witness for the defendant, supports plaintiff's contention that he did not engage or employ Stephen Grilly, and that plaintiff rendered valuable services to assist in the collection of taxes and penalties; (4) That although Peter Ellis (an officer of the Market Town Company) was present at the office of Mr. Richard L. Nummer at the time when the verbal agreement was entered into on-to-wit, January 10, 1930, he was not called as a witness in plaintiff's testimony to the facts in question, nor was any other witness called on behalf of the defendant in support of its contention; and (5) That the court based its decision and judgment in this matter solely upon the testimony of Richard L. Nummer who is one of the attorneys of record for the defendant and has executed the various affidavits filed in the proceedings of record, an attorney for said defendant.

The plaintiff contends that the trial court erred in basing its findings and rendering its judgment in favor of the defendant on the testimony of Richard L. Nummer, one of the attorneys for the defendant and counter-claimant, and suggests that under the authorities of this state it was an unethical act for Richard L. Nummer to testify as a witness in this case, and the trial court was fully bound to give but little, if any, credence to his testimony. Plaintiff points to the

statement of the trial court commenting upon the Richard P. Hummer testimony, where the court stated that Hummer's testimony gives the true version of the situation in this case, and plaintiff urges that in this connection the trial court also lost sight of the fact that as appears from the record Peter Ellis, one of the officials of the Market Town Company, was present at the alleged conversation as testified to by Richard P. Hummer, and no reason is shown why Peter Ellis was not called as a witness rather than Richard P. Hummer, his attorney. Plaintiff cites the case of Wilkinson v. People, 226 Ill. 135, where the court said:

"The fact that he does appear in this record in the unenviable attitude of a willing witness and a zealous attorney should not, perhaps, work a reversal of the judgment below if the record were in all other respects free from error, but we cannot overlook such professional impropriety when our attention is called to it."

and also cites Bishop v. Williard, 227 Ill. 382; Grindle v. Grindle, 240 Ill. 143; Wetzel v. Firebaugh, 251 Ill. 190; Flynn v. Flynn, 283 Ill. 206; and Havenscroft v. Stull, 280 Ill. 406. In this last cited authority, it is said by the court;

"For James W. Craig, Jr., to have testified would have been a breach of professional propriety, and if he had so far forgotten his duty and obligation as an attorney but little weight would have been given to his testimony and he would have lost public confidence and respect and the respect of the courts."

Plaintiff further relies on Erwin M. Jennings Company v. DiGenova, 107 Conn. 491.

The defendants reply is that the judgment is fully sustained by the record, disregarding the testimony of Richard Hummer, and maintains that the language used could not be plainer than that expressing plaintiff's obligation to handle without charge the securing of the tax reductions, and urge that plaintiff sought to enforce defendant's promise and avoid his own obligation. Defendant calls attention to the fact that plaintiff's statement of claim quotes only the portion of the agreement tending to show defendant's liability and omits these words; "John W. Ellis, in consideration of this concession, agrees to render his personal services without additional charge in obtaining the tax reductions, i. e. he agrees to handle the securing

of the tax reductions without any charge." Plaintiff admitted that he agreed to "what that says in that contract". Defendant suggests that plaintiff, although he was licensed to practice law and could personally have handled the securing of the tax reductions, not only failed to do so, but also failed to pay the fees of the attorney who did handle the securing of the tax reductions and took the position that he was not obligated to do so. Defendant contends that the record is clear that plaintiff's agreement to handle the securing of the tax reductions without charge to defendant was breached, and that, therefore, the finding of the court for plaintiff on his statement of claim and for defendant on its counter-claim and the entry of judgment for the defendant for the amount by which defendant's counter-claim exceeded the amount of the statement of claim was proper.

The plaintiff, however, calls attention that the defendant has completely ignored and failed to answer the plaintiff's brief where the following language appears;

"Neither in its pleadings or offered proof does defendant claim that plaintiff contracted to reduce the tax claim on the Kedzie Avenue property to any specific amount. Even the Hummer testimony does not go this far. It appears that the unpaid taxes amounted to Twenty Eight Thousand Dollars (\$28,000.00) and that plaintiff was only able to arrange for a reduction to Twenty Five Thousand Dollars (\$25,000.00). Grilly, however, was able to reduce these same taxes to Twenty Two Thousand Five Hundred Dollars (\$22,500) by using the data furnished him by plaintiff. Is it not fair to assume that this is why other reason appears in the record."

It does appear from the record that in this case the plaintiff was able by his action to reduce the tax burden from \$28,000.00 to \$25,000.00, and apparently the defendant being dissatisfied, engaged Grilly, who was able to obtain a further reduction of the same taxes to \$22,500.00. It appears from the record that the plaintiff, Ellis, did work that brought about the reduction, but it does not appear in any other testimony that he was to obtain a reduction of any fixed amount. It does not appear from an examination of the facts that he guaranteed by his efforts to reduce the taxes by a certain amount. That would be rather

an unusual agreement to make, and as far as we can understand the amount of the reduction to \$25,000 was rendered through the work and efforts of plaintiff. However, it does seem that the further reduction obtained by Mr. Crilly of \$2,500, was because he could do something that plaintiff could not do, and for which Crilly was to be paid the sum of \$1,077.96, which was almost one-half of the amount of the reduction obtained. There is no evidence that Crilly was retained by plaintiff. The fact is that he was retained by the Market Town Company at the agreed price. From the facts as they appear in this record, we are of the opinion that the court erred in allowing to defendant the sum of \$1,077.96, the agreed price that defendant was to pay Mr. Crilly for fees.

Therefore, the judgment for defendant on its counter-claim in the sum of \$1,077.96 is reversed, and the amount found due to the plaintiff in the sum of \$400.80 is affirmed, and judgment will be entered here for that amount.

AFFIRMED IN PART AND REVERSED IN PART
AND JUDGMENT HERE FOR \$400.80 in FAVOR
OF PLAINTIFF.

DENIS E. SULLIVAN AND BURKE, JJ. CONCUR.

an unusual agreement to make, and as the same was not intended to be
amount of the reduction to \$10,000 was maintained through the year and
efforts of plaintiff. However, it does seem that the further reduction
obtained by Mr. Kelly of \$2,500, was because he could be convincing
that plaintiff could not do, and the whole thing was to be said for
sum of \$1,077.98, which was almost one-half of the amount of the
reduction obtained. There is no evidence that Kelly was retained by
plaintiff. The fact is that he was retained by the United Fruit Company
at the agreed price. From the facts as they appear in this record, we
are of the opinion that the court was in error in allowing to defendant the
sum of \$1,077.98, the agreed price that defendant was to pay for Kelly
for less.
Therefore, the judgment for defendant on its counter-claim
in the sum of \$1,077.98 is reversed, and the amount found due to the
plaintiff in the sum of \$400.00 is affirmed, and judgment will be
entered here for that amount.

APPROVED BY THE COURT AND RECORDED IN BOOK
AND INDEXED BY THE CLERK OF THE COURT
AT TAMPA, FLORIDA
THIS 10TH DAY OF JANUARY, 1910.

LEWIS E. DILLON AND SONS, INC.,
PLAINTIFFS,

HALSTED CALUMET RIVER GOLF ASSOCIATION,)
 an Illinois corporation,

Plaintiff - Appellee,

v.

RIVERDALE COAL AND DOCK COMPANY, an
 Illinois corporation,

Defendant - Appellant.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

308 I.A. 670

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This action here on appeal is one by the plaintiff to remove a cloud and quiet title to certain real estate. The defendant, Riverdale Coal and Dock Company, appeals from an order entered August 30, 1940, denying, allegedly without hearing, its motion to vacate and dissolve a temporary injunction order entered July 23, 1940, and to vacate and set aside supplementary orders entered August 12, 1940, and August 19, 1940.

The complaint, filed June 20, 1940, alleged that for more than twenty years the plaintiff and its predecessors had been in possession of certain improved real estate, consisting of approximately 20 acres, described therein by metes and bounds, which plaintiff used as a golf course; that the defendant, as grantee under a certain deed, claimed some right, title or interest in the northerly portion of said land, and that employees and agents of defendant had trespassed thereon and destroyed boundary line monuments. The complaint contained a general allegation of irreparable damage and a prayer that the defendant be enjoined from trespassing, that plaintiff's title to said real estate be quieted and that defendant's claims be removed as a cloud on plaintiff's title.

On July 19, 1940, the plaintiff moved for an injunction and filed a "Supplement to complaint Application and Affidavit for Injunction" wherein the plaintiff alleged that the defendant had committed further trespasses and had dumped many tons of coke on the

MASTED C LUMBER REVENUE BOARD, INCORPORATED,
an Illinois corporation,
Plaintiff - Complainant,
v.
RIVERDALE COAL AND LUMP CO., INC.,
an Illinois corporation,
Defendant - Defendant.

STATE OF ILLINOIS
COUNTY OF COOK

3081A.670

MR. JUDICIAL JUDGE HENRY H. HARRIS OF THE COURT:

This action here on appeal is one by the Plaintiff to remove a cloud and quiet title to certain real estate. The defendant, Riverdale Coal and Lump Company, complains from an order entered August 30, 1940, denying, allegedly without hearing, its motion to vacate and dissolve a temporary injunction order entered July 22, 1940, and to vacate and set aside summarily orders entered August 12, 1940, and August 19, 1940.

The complaint, filed June 30, 1940, alleged that for more than twenty years the Plaintiff and its predecessors had been in possession of certain improved real estate, consisting of approximately 30 acres, described therein by metes and bounds, which Plaintiff used as a golf course; that the defendant, as grantor under a certain deed, claimed some right, title or interest in the nearly portion of said land, and that employees and agents of defendant had trespassed thereon and destroyed boundary line monuments. The complaint contained a general allegation of irreparable damage and a prayer for an injunction to enjoin the defendant from trespassing, and Plaintiff's title to said real estate be quieted and that defendant's claim be removed as a cloud on Plaintiff's title.

On July 12, 1940, the Plaintiff moved for an injunction and filed a "verbal" application for an injunction for "injunction" wherein the Plaintiff alleged that the defendant had committed further trespasses and had damaged and torn off some of the

disputed property which caused "large clouds of obnoxious dust" to float over plaintiff's grounds and damage its business. Defendant was ordered to file an answer to the complaint and supplement within 3 days and to refrain from unloading any coal or coke thereon other than to complete the unloading of a certain barge. Defendant answered, pursuant to said order, alleging that the plaintiff and defendant were owners of adjacent parcels of land in Section 32, defendant's land was in the north east quarter and that plaintiff's land was in the south east quarter of said section 32. The defendant specifically denied that the plaintiff was in possession of any land to which the defendant held the record title; denied the adverse possession of plaintiff; and denies that defendant had trespassed on lands owned by plaintiff. The answer described in detail the physical characteristics of the land in dispute, which constitutes a roadway and the top of a bank sloping steeply towards the Little Calumet River. It was also alleged that any coke or other material on said bank was on defendant's land and did not interfere with the use of plaintiff's land.

On the same day on which defendant's answer was filed, July 23, 1940, the court enjoined the defendant from entering upon the premises described in the complaint and from doing any acts thereon. Thereafter, on August 2, 1940, plaintiff filed a petition for a rule to show cause, charging that since the entry of the injunction order, the defendant had violated the injunction by dumping additional material on the premises described therein. On August 12, 1940, the court entered an order finding that the defendant had violated the order of July 23rd, and directing the defendant to show cause on August 19, why it should not be held in contempt of court. On this date, the court entered an order directing the defendant to proceed at once to remove all coal and coke located on the premises, and continued the rule to show cause.

Subsequently, on August 29, 1940, defendant moved to vacate and dissolve the temporary injunction entered on July 23, 1940, and to set aside and vacate the orders entered on August 12th and August

disputed property which caused "large clouds of opinion" that to
float over plaintiff's "house and damage its business." Defendant
was ordered to file an answer to the complaint and to appear within
5 days and to refrain from disposing any coal or coke within three
days than to complete the unloading of a certain barge. Defendant answered,
pursuant to said order, alleging that the plaintiff was defendant's
very owner of adjacent parcels of land in Section 35, defendant's
land was in the north east quarter and that plaintiff's land was in
the south east quarter of said section 35. The defendant specifically
denied that the plaintiff was in possession of any land to which the
defendant held the record title; denied the plaintiff's possession of
plaintiff; and denied that defendant had threatened or caused harm by
plaintiff. The answer described in detail the physical characteristics
of the land in dispute, which constituted a variety and the top of a
bank sloping steeply towards the little Kansas River. It was also
alleged that any case or other material on this bank was on defendant's
land and did not interfere with the use of plaintiff's land.
On the same day on which defendant's answer was filed,
July 23, 1940, the court entered the defendant from entering upon the
premises described in the complaint and from doing any acts therein.
Thereafter, on August 2, 1940, plaintiff filed a motion for a writ to
show cause, charging that since the entry of the injunction order, the
defendant had violated the injunction by dumping additional material
on the premises described therein. On August 13, 1940, the court
entered an order finding that the defendant had violated the order of
July 23rd, and directing the defendant to show cause on August 19, why
it should not be held in contempt of court. On this date, the court
entered an order directing the defendant to proceed at once to remove all
coal and coke located on the premises, and contained the rule to show
cause.
Subsequently, on August 27, 1940, defendant moved to vacate
and dissolve the temporary injunction entered on July 23, 1940, and
to set aside and vacate the order entered on August 13th and August

19th. Defendant's verified motion alleged, among other things, that: (1) the complaint as supplemented fails to state a cause of action cognizable in equity; (2) the complaint as supplemented omits necessary allegations with respect to the title and possession of plaintiff, insolvency of the defendant, exhaustion of legal remedies, and the necessity for injunctive relief; (3) the plaintiff has an adequate remedy at law. It is further alleged in defendant's motion to vacate, that: (a) on May 23, 1939, the defendant acquired title to land in the north east quarter of section 32 and since said date defendant has been in possession and had the beneficial use of said real estate; (b) on October 10, 1932, plaintiff acquired title to certain land in the south east fractional quarter of said section 32; (c) the United States government survey shows that the south boundary of defendant's land coincides and conforms with the easterly portion of the half section line drawn from a point 40 chains south of the north east corner of said section 32; (d) the Superior Court has previously adjudicated and found that the defendant's predecessors have paid taxes on the real estate acquired by defendant since 1867 and that since said date no other persons have had any interest in said real estate; (e) after the defendant acquired its property and before the issuance of the injunction herein it caused approximately 500 tons of coal to be placed thereon, and the removal of said coal would materially interfere with the operation of defendant's business and would cause irreparable damage and injury thereto; (f) defendant has not placed any coal or coke or other material on any property lying in the south east quarter of said section 32; (g) the mandatory order of August 19th, directing the defendant to remove coal from the premises was improperly granted because it amounts to a prejudgment of plaintiff's title, which should only be entered after an adjudication that the premises in dispute belonged to the plaintiff and not to the defendant.

It is further urged by defendant that the plaintiff filed no affidavits in opposition to said motion, and that when the cause

15th. Defendant's verified motion filed, signed John C. [illegible], 1932.

(1) The complaint as supplemented fails to state a cause of action cognizable in equity; (2) the complaint as supplemented with necessary allegations with respect to the title and possession of plaintiff, insolvency of the defendant, exhaustion of legal remedies, and the necessity for injunctive relief; (3) the plaintiff has no standing to sue. It is further alleged in defendant's motion to dismiss that: (a) on May 21, 1932, the defendant acquired title to land in the north east quarter of section 32 and since said date defendant has been in possession and had the beneficial use of said coal estate; (b) on October 10, 1932, plaintiff acquired title to certain land in the south east fractional quarter of said section 32; (c) the United States Government survey shows that the south boundary of defendant's land coincides and conforms with the westerly portion of the half section line drawn from a point 40 chains south of the north west corner of said section 32; (d) the superior court has previously adjudicated and found that the defendant's predecessor owned said land on the coal estate acquired by defendant since 1867 and that since said date no other persons have had any interest in said coal estate; (e) after the defendant acquired the property and before the issuance of the injunction thereto it caused approximately 400 tons of coal to be mined thereon, and the removal of said coal would materially interfere with the operation of defendant's business and would cause irreparable damage and injury thereto; (f) defendant has not placed any coal on sale or offered material on any property lying in the south east quarter of said section 32; (g) the mandatory order of August 1931, directing the defendant to remove coal from the premises was improperly granted because it would be a prejudgment of plaintiff's title, which should only be entered after adjudication that the coal lies in plaintiff's title in the

plaintiff and not to the defendant.

It is further urged by defendant that the plaintiff filed no affidavits in opposition to said motion, and that upon the return

came on for hearing, on August 30, 1940, the court denied the defendant's offers of proof and its offer to introduce evidence on the issues presented by the motion, and that, without affording a hearing to defendant, denied its motion to dissolve and vacate. It is from that order, denying defendant's motion, that defendant appeals.

The theory of the defendant is that the denial of a hearing requires a reversal, and the suggestion is made in support of this contention that the record discloses a dispute over a strip of land, the record title to which is in defendant and upon which the defendant is operating a part of its coal business, and that while plaintiff does not allege that it has title to the disputed area, it bases its claim upon an alleged adverse possession and seeks to remove an alleged cloud on title and to enjoin alleged trespass upon said property. Defendant points to the fact that the injunction entered by the trial court restrained the defendant from entering upon this property and, by mandatory order entered on August 19, 1940, the defendant was ordered to remove its coal and coke therefrom. It is contended that, although the defendant's answer and its verified motion deny the title and possession of plaintiff, the trial court summarily refused to permit the defendant to introduce evidence showing its title and possession and the condition of the real estate at the time the complaint was filed, and this is urged as reversible error.

It is urged by the defendant that a motion to dissolve an injunction may be made at any time and that the court shall decide such motion upon the weight of the testimony, under Ill. Rev. Stats. 1939, Ch. 69, secs. 15-17. Sec. 15 provides that "a motion to dissolve an injunction may be made at any time upon answer, or for want of equity on the face of the complaint." (As amended by act approved June 28, 1935, L. 1935. p. 914). Section 17 of the act provides that "the plaintiff may support his answer by affidavits filed with the same, which may be read in evidence on the hearing of the motion to dissolve the injunction". (As amended by Act approved June 28, 1935, L. 1935.

based on the hearing, on August 10, 1940, the court denied the defendant's offers of proof and its offer to introduce evidence on the issues presented by the motion, and that, without allowing a hearing to defendant, denied its motion to dissolve and reverse. It is now the order, denying defendant's motion, that defendant appeal.

The theory of the defendant is that the denial of a hearing requires a reversal, and the suggestion is made in support of this contention that the record discloses a mistake over a point of law, the record title to which is in defendant and upon which the defendant is operating a part of its coal business, and that while plaintiff does not allege that it has title to the disputed area, it asserts its claim upon an alleged adverse possession and seeks to remove an alleged cloud on title and to enjoin alleged trespass upon said property. Defendant points to the fact that the injunction entered by the trial court restricted the defendant from entering upon said property and by mandatory order entered in August 18, 1940, the defendant was ordered to remove the coal and coke therefrom. It is contended that, although the defendant's answer and its verified motion deny the title and possession of plaintiff, the trial court summarily refused to permit the defendant to introduce evidence showing its title and possession and the condition of the coal estate at the time the complaint was filed, and this is urged as reversible error.

It is urged by the defendant that a motion to dissolve an injunction may be made at any time and that the court shall decide upon the merits upon the weight of the testimony, under Ill. Civ. Code, 1935, Ch. 90, sec. 16-17. Sec. 16 provides that a motion to dissolve an injunction may be made at any time upon proof, or for want of proof, in the case of the complaint. (As amended by act approved June 25, 1935, L. 1935, c. 21.) Section 17 of the act provides that "the plaintiff may support his answer or affirmative claim with the same which may be used in evidence in the hearing of the motion to dissolve the injunction." (As amended by act approved June 25, 1935, L. 1935,

p. 914). The question, therefore, that is involved is whether the court erred in refusing and denying the motion of defendant to dissolve the injunction. It is well in the consideration of this question to have in mind the record at the time when the order for the temporary injunction was entered. Upon proper notice, defendant appeared and was represented by counsel and contested the proceedings for the entry of a temporary injunction. There seems to be no question but what the record shows that different attorneys were in court for the defendant and that a hearing was had on this question before three different judges. The Honorable John J. Lupe heard the preliminary motions and later set the case for hearing, examined the complaint, supplement to complaint and the answer, heard testimony and entered the injunctive order on July 23, 1940. At the time when this order was entered, it is well to have in mind that the defendant was present by its attorney, and that the defendants were ruled to offer evidence in resistance to this application for temporary injunction. The attorney for the defendant at the time stated to the court that they had no formal evidence to offer. The court then proceeded to consider the facts as they appeared in the evidence and the pleadings and it was upon this occasion that the injunctive order was entered. This injunctive order provides in substance, that until the further order of the court that the defendant, its officers, directors, attorneys, solicitors, agents and servants, . . . desist and refrain from entering upon the real estate, therein described, and from interfering with the plaintiff, its officers, clerks, employees, servants and guests, and from cutting trees, shrubs, erecting signs, dumping material or anything whatsoever on said real estate, or committing any nuisance affecting said real estate or rights of plaintiff in its lawful enjoyment thereof; and further that plaintiff file with the clerk of the court its individual bond for \$500.00, and deposit with the clerk of the court \$1,000.00 cash as security, and further provides the condition of the bond as presented.

The question that is before this court is on the motion -- to vacate the injunction -- subsequently made by defendant before the

P. 914). The question, therefore, that is involved is whether the court
erred in refusing and denying the motion of defendant to dissolve the
injunction. It is well in the consideration of this question to have in
mind the record at the time when the order for the temporary injunction
was entered. Upon a proper notice, defendant appeared and was represented
by counsel and contested the proceedings for the entry of a temporary
injunction. There seems to be no question but that the record shows that
different attorneys were in court for the defendant and that a hearing
was had on this question before three different judges. The Honorable
John J. Lusk heard the preliminary motions and before the case for
hearing, examined the complaint, defendant's answer and the answer,
heard testimony and entered the injunctive order on July 11, 1930.
At the time when this order was entered, it is well to have in mind that
the defendant was present by its attorney, and that the witnesses were
ruled to offer evidence in testimony to this application for temporary
injunction. The attorney for the defendant at the time failed to ask
the court that they had no formal evidence to offer. The court then proceeded
to consider the facts as they appeared in the evidence and the witnesses
and it was upon this occasion that the injunctive order was entered.
This injunctive order provided in substance, that until the further
order of the court that the defendant, its officers, directors, attorneys,
solicitors, agents and servants, . . . be and refrain from
entering upon the real estate, therein described, and from disposing
with the plaintiff, its officers, agents, servants, attorneys and agents,
and from cutting trees, shrubs, growing material or
anything whatsoever on said real estate, or committing any violation
affecting said real estate or rights of plaintiff in its interest in the
property; and further that plaintiff file with the clerk of the court
individual bond for \$500.00, and execute with the clerk of the court
\$1,000.00 cash as security, and further execute the condition of the
bond as presented.
The question that is before the court is the motion --
to vacate the injunction -- and whether it is proper before the

Honorable John C. Lewis, who heard the arguments and entered a rule that defendant/^{and}certain of its officers show cause why they should not be held in contempt of court for violating the injunction, and a further hearing was had before the Honorable Charles A. Williams, some of it cumulative, on the contempt proceeding and defendant's motion. When the cause came on to be heard on the questions that might arise in the contempt proceeding and defendant's motion to dissolve the temporary injunction, there was considerable discussion and argument by counsel before the court upon the questions involved. While the defendant stated that he had witnesses to testify as to the facts, no evidence -- except as to the section line and the removal of part of the coke -- was offered to the court from a witness sworn to testify to the facts which defendant expected to prove, and while the court denied the motion of defendant to establish by evidence the facts, still it would seem to be the duty of the defendant to have a proper record, showing that the witness was sworn and an offer made to prove by the witness facts which were material and pertinent on the questions before the court. It also appears that during the discussion before the court, the court suggested that, if the case was at issue, the matter would be referred to a Master in Chancery, where the parties could proceed the following day to present evidence on the merits of the case. There is, however, a question here which is material and that is that a motion to dissolve a temporary injunction does not require that the cause be heard on that motion as to the merits, the purpose of a preliminary injunction being, not to decide the merits of the cause, but to continue the matter in statu quo until the court has an opportunity to consider the cause in its entirety. A hearing on a motion to dissolve, of course, is not a hearing on the merits. In the case of Kuhl v. Clark, 261 Ill. App. 491, the court, upon an appeal by one of several defendants from an interlocutory order entered denying a motion to dissolve a preliminary injunction, in discussing the law applicable, said;

Honorable John G. Lewis, who heard the argument and rendered a ruling that defendant/certain of the officers show cause why they should not be held in contempt of court for violating the injunction, was further hearing was had before the Honorable Justice A. Williams, some of it cumulative, on the contempt proceeding and defendant's motion. When the cause came on to be heard on the petition for writ of habeas corpus the contempt proceeding and defendant's motion to dissolve the injunction, there was considerable discussion and argument by counsel before the court upon the questions involved. While the respondent stated that he had witnesses to testify as to the facts, no witness was offered to the court from a witness sworn to testify to the facts which defendant expected to prove, and while the court denied the motion of defendant to establish by evidence the facts, still it would seem to be the duty of the defendant to have a proper record, showing that the witness was sworn and an offer made to prove by the witness facts which were material and pertinent on the questions before the court. It also appears that during the discussion before the court, the court suggested that, if the case was at issue, the matter would be referred to a master in Chancery, where the parties could present the following set of questions evidence on the merits of the case. There is, however, a question here which is material and that is that a motion to dissolve a temporary injunction does not require that the cause be heard in that action as to the merits, the purpose of a preliminary injunction being, and as decide the merits of the case, but to continue the matter in statu quo until the court has an opportunity to consider the cause in its entirety. A hearing on a motion to dissolve, of course, is not a hearing on the merits. In the case of Robt. v. State, 101 Ill. App. 3d 101, 102, the court upon an appeal by one of several defendants from an interlocutory order entered denying a motion to dissolve a preliminary injunction, in discussing the law applicable, said;

"The purpose of a preliminary injunction is not to decide the merits of the cause, but to continue the matter in statu quo until the court had an opportunity to consider the cause in its entirety. A hearing on a motion to dissolve a temporary injunction is not a hearing on the merits. Whether the status quo should be preserved depends not only upon the probable disposal of the case immediately on a hearing to dissolve the preliminary injunction, but also upon the relative injury that might be sustained by the parties by the action of the court in granting or refusing the motion. Barrell v. Lake Forest Water Co., 200 Ill. 529; Fishwick v. Lewis, 258 Ill. App. 402. The court in its opinion in the Fishwick case, says;

"A motion to dissolve a temporary injunction is not necessarily a hearing on the merits, but presents the question whether it is advisable to preserve the status quo of the matters in controversy by a continuance of the temporary injunction until a final hearing on the merits of the case. Whether the status quo should be preserved until the final hearing depends not only upon the probability that a case will be made out on a final hearing, but also upon the relative injury that might be sustained by the parties by the action of the chancellor in granting or refusing the motion. Barrell v. Lake Forest Water Co., 200 Ill. App. 529; Russell v. Farley, 105 U. S. 433; Kerr on Injunctions, 209, 210. Where the sole object for which the temporary injunction is sought is the preservation of a fund in controversy or the maintenance of the status quo until the question of the right between the parties can be decided on final hearing, the injunction is properly allowed or maintained even where there may be a serious doubt as to the ultimate success of the complaint. Harriman v. Northern Securities Co., 132 Fed. 464. To the same effect is the holding in City of Newton v. Lewis, 25 G. C. A. 161, 79 Fed. 715 and Rago v. Village of Melrose Park, 161 Ill. App. 18; Young v. Federal Union Surety Co., 183 Ill. App. 278. In the later case the court refers to City of Newton v. Lewis, *supra*, and quoted the language of the court in deciding the principle which is here involved. The court said in that case: "The granting or withholding of a preliminary injunction rests in the sound judicial discretion of the court, and the only question presented by this appeal is whether or not the court below erred in the exercise of that discretion under the established legal principles which should have guided it. The propriety of his action must be considered from the standpoint of that court . . . The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation, as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. . . ."

It is, therefore, proper in this case for the court to have ruled as he did. There is nothing before this court as to the character of the evidence or the purpose of the evidence offered, and from the answer filed by defendant, it would appear that the defense and the basis for defendant's motion to dissolve went to the merits of the case. Under the authority just cited, it could not be proper for the court to decide the case on its merits as they were called to the court's attention by the defendant. The injunction was issued in

this case upon a hearing before Judge Lupe, at which hearing the defendant was ruled to offer its evidence, which defendant refused to do. Thereupon, the court having considered the questions before him entered the order for a temporary injunction, which is the subject of the questions before the court at this time. The court acted within its discretionary powers, and under the circumstances appearing in the record that the trial court offered to refer the matter to a Master for a hearing the following day, and defendant did not seem anxious to have such a reference, we are of the opinion that the court did not commit error in denying the defendant's motion to dissolve the temporary injunction.

The action of the court in denying the motion of defendant to dissolve the temporary injunction and to set aside the orders entered on August 12th and August 19th, 1940, is affirmed.

AFFIRMED.

DENIS E. SULLIVAN AND BURKE, JJ. CONCUR.

his case upon a hearing before Judge Cook, at which hearing the
defendant was ruled to offer his evidence, which defendant refused to do.
Whereupon, the court having considered the evidence before him
entered the order for a temporary injunction, which is the subject of
the questions before the court at this time. The court stated that
its discretionary powers, and under the circumstances appearing in
the record that the trial court offered to enter the decree is a
matter for a hearing the following day, and defendant did not wish
to have such a reference, but one of the reasons that the court
did not commit error in denying the defendant's motion to dissolve the
temporary injunction.

The action of the court in denying the motion of defendant
to dissolve the temporary injunction and to set aside the order
entered on August 14th and August 15th, 1940, is affirmed.

WYOMING.

THIS IS CERTIFICATE OF THE COURT, 1940.

41111

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
JOHN S. RUSCH,

v. Appellee,

SIDNEY BRILL, JERRY KEBLUSEK, SAMUEL BLOOM,
SIDNEY EPSTEIN, MOLLIE FRIEDMAN,

Appellants.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

308 I.A. 671

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

A primary election was held in Chicago on April 12, 1938.

Sidney Brill and Jerry Keblusek served as Democratic judges in the 54th precinct of the 24th ward. Samuel Bloom acted as Republican judge. Sidney Epstein and Mollie Friedman were the Democratic and Republican clerks respectively. On January 21, 1939, a petition was filed against said judges and clerks in the County Court of Cook County by the Chief Clerk of the Board of Election Commissioners. The petition alleged various acts of misconduct. The County judge granted leave to file the petition and directed that the respondents show cause why they should not be found guilty of contempt of court. They were attached and gave bond for their appearance. The court entered a judgment finding the three judges (Sidney Brill, Jerry Keblusek and Samuel Bloom) guilty of: "(1) Permitting or acquiescing in permitting the precinct captain to assist voters and mark their ballots, (2) Calling and recording votes contrary to statute during the canvass." The clerks (Sidney Epstein and Mollie Friedman) were found guilty of failing to keep their tally sheets in the manner prescribed by law or by the rules of Election Commissioners. All of the respondents, judges and clerks alike, were found guilty of making a false canvass and of permitting or acquiescing in permitting official ballots to be changed, altered or erased by persons other than the voters. All of the respondents were found guilty of misconduct and misbehavior as officers of the County Court and guilty of contempt of court. Each of the respondents was sentenced to serve one year in the common jail of Cook County. Petitioners prosecute this appeal to review the judgment.

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
JOHN E. RUSSO,
Appellee,
v.
SIDNEY BRILL, JERRY KEBLUSCH, SAMUEL BLISS,
SIDNEY EUSTIN, MORRIS GOLDMAN,
Appellants.

3081A.851

MR. JUSTICE BUNNET DELIVERED THE OPINION OF THE COURT.

A primary election was held in Chicago on April 12, 1933.

Sidney Brill and Jerry Keblusck served as Democratic judges in the 24th precinct of the 24th ward. Samuel Bliss acted as Republican judge.

Sidney Eustein and Morris Goldstein were the Democratic and Republican clerks respectively. On January 21, 1933, a petition was filed against said judges and clerks in the County Court at Cook County by the Clerk of the Board of Election Commissioners. The petition alleged various acts of misconduct. The County Judge granted leave to file the petition and directed that the respondents show cause why they should not be found guilty of contempt of court. They were attached and gave bond for their appearance. The court entered a judgment finding the three judges (Sidney Brill, Jerry Keblusck and Samuel Bliss) guilty of:

"(1) Permitting or acquiescing in receiving the precinct register to assist voters and mark their ballots, (2) Calling and receiving voters contrary to statute during the canvass, (3) The clerks (Sidney Eustein and Morris Goldstein) were found guilty of failing to keep their lists sheets in the manner prescribed by law or by the rules of Election Commissioners. All of the respondents, judges and clerks alike, were found guilty of making a false canvass and of receiving an unauthorized amount of money for the same, and of changing, altering or giving up in permitting official ballots to be changed, altered or given up to persons other than the voters. All of the respondents were found guilty of misconduct and misbehavior as officers of the County Court and guilty of contempt of court. Each of the respondents was sentenced to serve one year in the common jail of Cook County, Illinois, and to pay this appeal to review the judgment.

The first point urged by the respondents is that the trial court erred in not holding himself disqualified from hearing the cause and assigning the case to some other judge for trial. The trial judge was a candidate for nomination as County Judge in the April, 1938 primary, at which the respondents served as election officials. The respondents made a record claiming that the County Judge was interested and also prejudiced. The record on the subject of interest and prejudice is similar to that in the following cases: No. 41156, People v. Oscar Tucker, et al., Nos. 41134, People v. Milton Festenstein et al., and No. 41386, People v. Henry Levin, et al. Because of the similarity of the facts and of the law applicable thereto we adopt the views expressed in those opinions.

Therefore, the judgment is reversed and the cause remanded with directions that it be assigned for trial to some judge other than the judge who presided at the instant trial.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

The first point urged by the respondents is that the trial

court erred in not holding himself disqualified from hearing the

cause and assigning the case to some other judge for trial. The trial

judge was a candidate for nomination as County Judge in the next

1928 primary, at which the respondents served as election officials.

The respondents made a second claim that the County Judge was ineligible

and also prejudiced. The record on the subject of interest and pre-

judice is similar to that in the following cases: No. 41367, People

v. Oscar Turner, et al., No. 41368, People v. Henry Levin, et al., because of the similarity

of the facts and of the law applicable thereto to those of the

expressed in those opinions.

Therefore, the judgment is reversed and the cause remanded

with directions that it be assigned for trial to some judge other than

the judge who presided at the instant trial.

REVEREND AND HONORABLE JUSTICE.

WILLIAM J. HENRY, JUDGE.

WILLIAM J. HENRY, JUDGE.

41465

JOHN WESLEY RIGGS, a Minor by ELWOOD RIGGS,
his next friend and ELWOOD RIGGS,

Plaintiffs (Appellees and Cross-Appellants),

v.

WILLIAM M. BARRETT, individually and as Admin-
istrator with the Will Annexed of the Estate
of ENID P. BARRETT, Deceased,

Defendant (Appellant under separate appeal
by Co-party),

KATHRYN A. CULVER, LUANA CULVER, JEWEL RUNDELL
BAKER, as Administratrix of the Estate of
LEWIS F. BAKER, Deceased,

Defendants-Appellees,

METROPOLITAN TRUST COMPANY as Ancillary Adminis-
trator de bonis non with will annexed of Estate
of ENID P. BARRETT, Deceased,

Defendant (Appellee and Cross-Appellant),

IDA GROVES GREGORY,

Defendant (Appellee in Appeal No. 41466 and
Appellant in Appeal No. 41465,) and

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST
COMPANY OF CHICAGO, as Successor Trustee under Trust
Agreement between ELWOOD RIGGS and ILLINOIS MERCHANTS
TRUST COMPANY, dated July 3, 1925,

Defendant (Appellee in Appeal No. 41465 and
Appellant in Appeal No. 41466.)

APPEAL FROM

CIRCUIT COURT

308 I.A. 671²

COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The opinion filed concurrently herewith in case No. 41466 is
controlling. Therefore, the decree of the Circuit Court of Cook
County is reversed and the cause remanded with directions to enter
a decree not inconsistent with the views expressed in the opinion
in case No. 41466.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

JOHN WESLEY RIGGS, a Minor by ELWOOD RIGGS,
his next friend and ELWOOD RIGGS,

Plaintiffs (Appellees and Cross-Appellant),

v.

WILLIAM M. BARRETT, individually and as Admin-
istrator with the will annexed of the estate
of ENID P. BARRETT, Deceased,

Defendant (Appellant under separate appeal
by Co-party),

KATHRYN A. CULVER, LUANA CULVER, JEWELL MONTELL
BAKER, as Administratrix of the estate of
LEWIS T. BAKER, Deceased,

Defendants-Appellees,

METROPOLITAN TRUST COMPANY as Auxiliary Adminis-
trator de bonis non with will annexed of estate
of ENID P. BARRETT, Deceased,

Defendant (Appellee and Cross-Appellant),

IDA GROVES GREGORY,

Defendant (Appellee in Appeal No. 41466 and
Appellant in Appeal No. 41465), and

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST
COMPANY OF CHICAGO, as Successor Trustee under Trust
Agreement between ELWOOD RIGGS and ILLINOIS METROPOLITAN
TRUST COMPANY, dated July 3, 1925,

Defendant (Appellee in Appeal No. 41466 and
Appellant in Appeal No. 41465).

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The opinion filed concurrently herewith in case No. 41465 is

controlling. Therefore, the decree of the Circuit Court of Cook
County is reversed and the cause remanded with directions to enter
a decree not inconsistent with the views expressed in the opinion
in case No. 41465.

REVERSED AND REMANDED WITH DIRECTIONS.

HERBERT, P. J. AND DENNIS E. SULLIVAN, J. CONCUR.

41577

JOHN WEIZIS and AMELIA WEIZIS,

Appellants,

v.

JOSEPH DOMEIKIS, MARY DOMEIKIS and
CHARLES MILLER.

CHARLES MILLER,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

308 I.A. 672

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 27, 1936, a judgment by confession was entered in the Municipal Court of Chicago for the sum of \$1,242.50. The judgment was based on a note signed by the defendants, dated October 8, 1929. On the face of the note the defendants promised to pay to the order of plaintiffs on demand the sum of \$1,000, plus interest. Judgment was entered for the full amount of the principal, plus interest and attorney's fees. Various proceedings were had on the application of the defendants Joseph Domeikis and Mary Domeikis. It is unnecessary to discuss these proceedings. Subsequently, the defendant Charles Miller filed a petition to vacate the judgment, alleging that he signed the note as a witness, and that he was not to be held liable as a party to the note, and that he did not receive any consideration for signing the note as principal, surety, endorser or otherwise. The court opened up the judgment to give Miller leave to defend, and ordered that the judgment stand as security, and that his petition stand as an affidavit of defense. The case has been tried before three juries. The first verdict found against the plaintiffs. On a new trial the second jury disagreed. On a third trial the jury also found against the plaintiffs. A motion for a new trial was overruled and the court entered judgment on the verdict. This appeal followed.

Plaintiffs' theory of the case is that all of the defendants became indebted to them on a certain note executed during 1926, and

JOHN WILLIAM AND ANNE, PLAINTIFFS,

v.

JOSEPH POMERANCE, DEFT.
CHARLES WILLIAM.

CHARGE WILLIAM.

Appellate.

308 L.A. 672

MR. JUSTICE HOWES delivered the opinion of the court.

On July 27, 1922, a judgment by court clerk was entered in the Municipal Court of Chicago for the sum of \$1,000.00. The judgment was based on a note signed by the defendant, dated October 2, 1921. On the face of the note the defendant's account to pay to the order of plaintiff on demand the sum of \$1,000, plus interest. Judgment was entered for the full amount of the principal, plus interest and attorney's fees. Various proceedings were had on the application of the defendant's Joseph Pomerville and Mary Pomerville. It is unnecessary to set out these proceedings. Subsequently, the defendant Charles William filed a petition to vacate the judgment, alleging that he signed the note as a witness, and that he was not at the time it was made as a party to the note, and that he did not receive any consideration for signing the note as principal, merely, and hence he was not liable. The court ordered up the judgment to five lines leave to stand, and ordered that the judgment stand as actually, and that the petition stand as an affidavit of defense. The case was then tried before Judge Justice. The jury verdict found against the plaintiff. On a rehearing the jury also found against the plaintiff. A motion for a new trial was granted and the court entered judgment on the verdict. This appeal followed.

Plaintiff's theory of the case is that all of the defendants became indebted to him in a certain order according to time, and

that the note sued on in this case was given to replace the prior note at the time it became due; that they turned over the sum of \$1,000 at the request of all parties at the time the first note was executed, and that all parties are liable as principals on said note. Miller's theory of the case is that he signed the note as a witness and not as a principal; that there never was a prior note and that he did not receive any consideration for the execution of the note.

From the standpoint of plaintiffs the evidence tends to show that in 1926 plaintiff John Meizis, at the request of defendants Miller and Domeikis, made a loan to Domeikis in the sum of \$1,000, and received a note signed by Joseph Domeikis, Mary Domeikis and Charles Miller and the latter's wife. This note matured in 1929 and a new note was executed, signed by Domeikis and his wife and Miller. The new note was not signed by Mrs. Miller. No payments were made on the note of October 5, 1929. The position of plaintiffs was supported by the testimony of John Meizis, one of the plaintiffs, and Joseph Domeikis, one of the defendants. The defendant Charles Miller was the only one to testify in his own behalf. He denied that he executed a note in 1926. He stated that in 1929 he was asked to sign his name as a witness at the request of Joseph Domeikis; that at that time he could not read or write English; that he could read and write German and Lithuanian; that he had been in the United States for about 20 years; that he did not understand that he was signing a note; that Domeikis told him (Miller) that he was trying to borrow \$1,000 from Meizis; that Meizis wanted Domeikis to turn over two real estate lots that were worth \$1,250; that Domeikis told Miller to sign as a witness so that when Domeikis paid the \$1,000 "you see that I get the deeds back." Miller further testified that he did not read the paper, nor did he receive anything for signing.

The first point urged by plaintiffs is that the introduction of the note in evidence and the proving of the signatures thereto made a prima facie case. The second point is that the "burden of proving

that the note was on in this case was given in order to the other party
at the time it became due; that that money was the sum of \$1,000.00
the request of all parties at the time the note was given.
and that all parties were liable as principals in said note. Plaintiff's
theory of the case is that he signed the note as a witness and not as
a principal; that there never was a prior note and that he did not
receive any consideration for the execution of the note.

From the recollection of Plaintiff's own evidence found in that
that in 1928 Plaintiff John Keltie, at the request of Defendant Miller
and Domelka, made a loan to Domelka in the sum of \$1,000.00 and received
a note signed by Joseph Domelka, Mary Domelka and John Keltie and
the latter's wife. This note was given in 1928 and a new note was given
dated, signed by Domelka and his wife and Miller. The new note was
not signed by Mrs. Miller. The payments were made on the note of 1928
in 1928. The position of Plaintiff's was supported by the testimony of
John Keltie, one of the defendants, and Joseph Domelka, one of the de-
fendants. The defendant John Miller was the only one who testified in
his own behalf. He denied that he received a note in 1928. He stated
that in 1928 he was asked to sign the note as a witness at the request
of Joseph Domelka; that at that time he could not read or write
English; that he could read and write German and Lithuanian; that he
had been in the United States for about 10 years; that he did not un-
derstand that he was signing a note; that Domelka told him (Miller)
that he was trying to borrow \$1,000 from Miller; that Miller wanted
Domelka to turn over the cash before Miller told him that Miller told
Domelka to sign the note as a witness and that Domelka told
the \$1,000 "you see that I got the money from Miller and Domelka said
that that he did not read the paper, and that he was not signing the
signature.

The first point raised by Plaintiff is that the testimony
of the note in evidence and the signing of the same by Domelka were
a prima facie case. The second raised is that the burden of proving

absence or failure of consideration under the Negotiable Instruments law is upon the defendant who seeks to assert it." There is no challenge to the statement that the introduction of the note made a prima facie case. Miller defended on the ground that he signed the note merely as a witness and that the parties understood that he was signing it as a witness, and that he received no consideration therefor. Clearly this was an affirmative defense. The burden was on the defendant to establish such defense by a preponderance of the evidence. As we have seen, one jury disagreed and two juries decided the issue of fact in favor of the defendant. There is a sharp conflict in the testimony. If the jurors believed the witnesses who testified for the plaintiffs it was their duty to return a verdict for the plaintiffs. It is apparent, however, that the jurors believed the testimony of the defendant. In their third point plaintiffs argue that at the close of all the evidence the court should have allowed their motion for a directed verdict against the defendant. We cannot agree with that contention. To so hold would, in effect, do away with trials by jury. The jury saw and heard the witnesses. We would not be warranted in setting aside the verdict on the basis that it is against the manifest weight of the evidence.

The plaintiffs tendered twelve instructions. The court, however, decided to instruct the jury orally. Parts of the charge to the jury are subject to criticism. Prior to the presentation of the argument to the jury, the attorneys consulted with the trial judge in his chambers. The record does not disclose what was discussed in the chambers. The record, however, does not show that before the jury retired to consider the verdict, plaintiffs objected to any of the instructions, or suggested the giving of any additional instructions. Rule 171 of the Municipal Court, in effect at the time of the trial of the instant case, provides that "objections to the charge must be made before the jury retires and must specifically point out wherein the part objected to is erroneous, and the party objecting must indicate clearly the corrections therein desired to be made, and upon the objections being made the judge

advance or failure of consideration under the contract instrument
is upon the defendant who seeks to retract it. There is no obligation
to the statement that the introduction of the note was a subterfuge
case. Miller defended on the ground that he placed the note away, it
a witness and that the parties understood that he was placing it as a
witness, and that he received no consideration therefor. Similarly, this
was an affirmative defense. The burden was on the defendant to establish
such defense by a preponderance of the evidence. As we have seen, the
jury disagreed and two jurors decided the issue of fact in favor of the
defendant. There is a strong possibility in the testimony. It has been
believed the witnesses who testified for the plaintiff is not their duty
to return a verdict for the plaintiff. It is apparent, however, that
the jurors believed the testimony of the defendant. It should be
pointed out that at the close of all the evidence the court
should have allowed their motion for a directed verdict against the de-
fendant. We cannot agree with that conclusion. It is not possible to
effect, do away with trials by jury. The jury are not bound by the
necessity. We would not be warranted in setting aside the verdict on the
basis that it is against the weight of the evidence.
The plaintiff requested certain instructions. The court, how-
ever, decided to instruct the jury saying, "Some of the charges on the
jury are subject to objection. What is the position of the defendant
to the jury, the attorney conferred with the trial judge in his
chambers. The record does not disclose what was discussed in the
chambers. The record, however, does not show that before the jury retired
to consider the verdict, plaintiff objected to any of the instructions,
or suggested the giving of any additional instructions. Rule 17 of the
Michigan Court, in effect at the time of the trial at the instant case,
provides that "objection to the charge must be made before the jury
retires and must specifically point out wherein the jury is objected to is
erroneous, and the party objecting must indicate clearly the correction
therein desired to be made, and upon the objection being made the judge

may make such corrections as he may deem proper." As the record does not show that there was any objection to the instructions as given before the jury retired, plaintiffs will not now be heard to voice any objections thereto.

For the reasons stated, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J., and DENIS E. SULLIVAN, J, CONCUR.

may have such convictions as he may deem proper, in the absence of
not show that there are any objections to the testimony of any
before the jury retired, and that it will not be deemed to raise
any objections thereto.

For the reasons stated, the judgment of the Municipal Court
of Chicago is affirmed.

JUDGMENT AFFIRMED.

WHEEL, P. J., and HENRI F. MILLER, J., CONCUR.

41683

HOWARD F. HOBBS,

APPEAL FROM

Appellee,

SUPERIOR COURT

v.

COOK COUNTY.

H. M. GOUSHA COMPANY,

Appellant.

308 I.A. 672²

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On October 25, 1939, we filed an opinion in this cause, the concluding paragraph of which reads:

"As plaintiff was not traveling after the middle of January, 1936, we are of the opinion that he is entitled to a salary at the rate of \$300.00 per month for three months, commencing with January 15, 1936, and to \$3,000.00 per year for each year commencing with April 15, 1936; that if defendant continues to use the idea and material of the Hobbs Guide Division, that the court retain jurisdiction to enter judgment each year for such additional amount as is due under the terms of the contract. Therefore, the decree is reversed and the cause is remanded to the Superior Court of Cook County with directions to enter a decree in accordance with the recommendation of the Master in Chancery, except that the judgment shall be based on a salary at the rate of \$300.00 per month for three months from January 15, 1936. Judgment shall also be entered for an additional sum of \$12,000.00, the amount due under the contract for the years beginning May 1, 1936, May 1, 1937, May 1, 1938 and May 1, 1939, at \$3,000.00 per year, and that the court shall retain jurisdiction in the cause to enter judgment each year for such additional amount as is due under the terms of the contract, if defendant continues to use the Hobbs Guide Idea and material."

Defendant filed a petition for rehearing, which was allowed. On December 13, 1939, we filed a supplemental opinion in which we recited that having reconsidered all of the points raised, we adhered to the views expressed and the directions given in the opinion theretofore filed. The mandate of this court, issued December 13, 1939, reads:

"On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceeding aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises on a rehearing in said cause are of the opinion that in the record and proceedings aforesaid, and in the rendition of the decrees aforesaid, there is manifest error: Therefore, it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the decree of the Superior Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to said Superior Court to enter a decree in accordance with the recommendation of the Master in Chancery, except that the judgment shall be based on a salary at the rate of \$300.00 per month for three months from January 15, 1936. Judgment shall also be entered for an additional sum of \$12,000.00, the amount due under the contract for the years beginning May 1, 1936, May 1, 1937, May 1, 1938 and May 1,

ROBERT F. DODGE

Angelo

v.

M. W. DODGE COMPANY

Alameda

OFFICE OF THE

CLERK OF THE COURT

COUNTY OF ALAMEDA

808-1-4-672

MR. JUSTICE BAKER

On October 23, 1935, we filed an opinion in this case, the

concluding paragraph of which reads:

"As plaintiff was not prevailing after the trial of January 1935, we are of the opinion that he is entitled to a salary of \$2,000.00 per month for three months, commencing with January 15, 1935, and to \$2,000.00 per year for each year commencing with April 15, 1935; that if defendant's position to use the title and material of the Hobbs Guide Division, that any court which shall direct to enter judgment on this case shall also direct that the cause be reversed and the cause be remanded to the Superior Court of Alameda County with directions to enter a decree in accordance with the recommendation of the Master in Chancery, and that the defendant shall be based on a salary of \$2,000.00 per year for three months from January 15, 1935, but not shall also be ordered for an additional sum of \$2,000.00, the amount due under the contract for the years beginning May 1, 1935, to May 1, 1937, and May 1, 1937, at \$2,000.00 per year, and that the court shall retain jurisdiction in the cause to enter judgment on any such additional amount as is due under the terms of the contract, if defendant's position to use the Hobbs Guide has not materialized."

Defendant filed a petition for rehearing, which was allowed. On

December 13, 1935, we filed a supplemental opinion in which we stated

that having reconsidered all of the points raised, we adhere to the

views expressed and the directions given in the original opinion.

The mandate of said court, issued December 13, 1935, reads:

"On this day we have read the said opinion, and the court division diligently examined and considered, we all are agreed and recommending that the cause be reversed and the cause be remanded to the Superior Court of Alameda County with directions to enter a decree in accordance with the recommendation of the Master in Chancery, and that the defendant shall be based on a salary of \$2,000.00 per year for three months from January 15, 1935, but not shall also be ordered for an additional sum of \$2,000.00, the amount due under the contract for the years beginning May 1, 1935, to May 1, 1937, and May 1, 1937, at \$2,000.00 per year, and that the court shall retain jurisdiction in the cause to enter judgment on any such additional amount as is due under the terms of the contract, if defendant's position to use the Hobbs Guide has not materialized."

1939, at \$3,000.00 per year, and that the court shall retain jurisdiction in the cause to enter judgment each year for such additional amount as is due under the terms of the contract, if defendant continues, to use the Hobbs Guide idea and material, and for such other and further proceedings as to law and justice shall appertain. And it is further considered by the court that the said appellant recover of and from the said appellee his costs, by him in this behalf expended to be taxed, and that he have execution therefor."

A petition for leave to appeal to the Supreme Court was denied. The mandate was filed in the Superior Court of Cook County on April 26, 1940, and the cause was redocketed and assigned to a chancellor for further proceedings in accordance with the mandate. On June 6, 1940, the defendant filed written objections and a petition. Therein defendant objected to the entry of any decree of judgment against it in the sum of \$12,000.00, or any part thereof, or any amount alleged to be due for the years beginning May 1, 1936, May 1, 1937, May 1, 1938 and May 1, 1939, and further alleged that the part of the mandate relating to the sum of \$12,000.00 was void and of no effect; that the Appellate Court was without jurisdiction to adjudicate such matters against the defendant, and that there was not and is not in the record of this cause any basis for such adjudication against the defendant either in the pleadings or in the evidence; that defendant is not and never has been indebted to the plaintiff in said amounts or any part thereof, and that it has not during any of the enumerated years made any use whatever of the alleged Hobbs Guide idea or material, or any part of the subject matter of the alleged contract, and had not retained any of said materials or subject matter, but on the contrary had repeatedly offered to the plaintiff the surrender and delivery to him of all materials, rights, ideas, methods, data, records, correspondence, engravings and copyrights mentioned or contemplated in the alleged contract; that on April 4, 1938, plaintiff addressed and delivered to the defendant a letter reading:

"Hollywood, California April 4, 1938.

Mr. R. R. Erving,
H. M. Gousha Co.
Chicago, Ill.

Dear Mr. Erving:

At our last conference you said that it was your intention to turn the guide back to me on May 1st, and your confirmation at this time seems to be in order.

1932, at \$1,000.00 per year, and that the court shall retain jurisdiction in the case to enter judgment each year upon application amount as is due under the terms of the contract, if defendant continues to use the Hobbs rule and material, and for each other and further proceedings as to law and justice shall be determined by the court that the said application is proper and from the said application its costs, in this in this behalf requested to be taxed, and that he have execution therefor.

A petition for leave to appeal to the Supreme Court was denied. The mandate was filed in the Superior Court of Cook County on April 10, 1933, and the cause was rebooked and assigned to a calendar for further proceedings in accordance with the mandate. On June 2, 1933, the defendant filed written objections and a petition. Therein defendant objected to the entry of any decree or judgment against it in the sum of \$15,000.00, or any part thereof, or any amount alleged to be due for the years beginning May 1, 1932, May 1, 1933, May 1, 1934, May 1, 1935, and further alleged that the part of the mandate relating to the sum of \$15,000.00 was void and of no effect; that the Superior Court had no jurisdiction to adjudicate such matters against the defendant, and that there was not and is not in the record of this cause any basis for such adjudication against the defendant either in the pleadings or in the evidence; that defendant is not and never has been indebted to the plaintiff in any amount of any part thereof, and that it has not waived any of the enumerated years made any use whatever in the alleged breach of the idea or material, or any part of the subject matter of the alleged contract, and had not retained any of said materials in violation of contract, but on the contrary had repeatedly offered to the plaintiff the surrender and delivery to him of all material, rights, titles, interests, records, correspondence, documents and copies of the same, and contemplated in the alleged contract; that on April 1, 1933, plaintiff addressed and delivered to the defendant a letter reading:

Mr. J. R. Smith,
R. M. Graham Co.,
Chicago, Ill.

Dear Mr. Smith:

At our last conference you said that if we had your instructions as to the rules to be in effect, we would be in a better position to be in order.

If you do not wish to take such action apart from our litigation are you willing and disposed to settle with me on our lawsuit now and pay me sum due as per our agreement?

I await your reply and terms if you are interested and thank you now."

The objections further recited that on April 22, 1938, defendant addressed a letter to plaintiff, reading:

"April 22, 1938.

Mr. Howard F. Hobbs,
1536 Northwestern Ave.
Hollywood, California

Dear Sir:

Answering your recent letter, addressed to our Mr. Erving, your understanding is correct that we adhere to our desire to turn the guide back to you and that we now wish this to be completely accomplished before May 1, 1938.

We wish you would state more specifically what you mean by your suggestion 'to take such action apart from our litigation, etc.' We assume you are aware that, under date of October 6, 1936, Fred A. Gariepy served on us a written notice that he claims an attorney's lien for 25% of all 'monies, property and avails.'

From our standpoint, the most desirable way to make delivery to you would be through Mr. Gariepy, thus saving us from the necessity of inquiring into your arrangements with him. If you do not want to do it that way, of course that is your affair.

In either case we wish it to be clearly understood that we are making no use of the guide and have no desire to use it; that we do not wish to retain any of the guide ideas, methods, data, records, correspondence, drawings, engravings or copyrights, either those brought by you or those developed since you entered in our employ; and that we have no objection to your making use of those materials as you desire. We wish you would take them all as promptly as possible; and, as we have told you before, we would prefer that you accept delivery before May 1st.

You should be prepared to give us such receipt or release as will assure us that we need not contest with Mr. Gariepy his claim for lien on account of anything you may receive. Kindly advise us as to when you will accept delivery and whether you will handle it yourself or by representative.";

that after the final decree entered on May 16, 1938, in the Superior Court of Cook County defendant represented to plaintiff its offer to deliver to him all the materials and rights by him claimed; that on each of the occasions and until after the final judgment of the Appellate Court the plaintiff failed and refused to accept defendant's offer, and failed to provide defendant any protection against an attorney's lien, claimed by virtue of a notice thereof served on defendant; that during the pendency of the appeal in the Appellate Court, plaintiff reengaged in the business of publishing the Hobbs Guide as theretofore, but withheld knowledge thereof from the defendant until after the final judgment of the Appellate Court; that shortly after the Appellate Court judgment of December 13, 1939, plaintiff admitted to defendant that he was and had

If you do not wish to take such action upon the
 litigation are you willing and disposed to assist with us on the lawsuit
 now and pay no sum; due as per our agreement?
 I await your reply and advise if you are interested and thank
 you now."

The objection further stated that on April 12, 1938, Plaintiff delivered
 a letter to Plaintiff, reading:

"April 12, 1938."

Mr. Howard F. Hobbs,
 1538 Northwestern Ave.,
 Hollywood, California

Dear Sir:

Answering your recent letter, addressed to Mr. F. Hobbs,
 your understanding is conveyed that we desire to our desire to have the
 guide back to you and that we now plan this to be a complete accomplishment
 before May 1, 1938.

As you would state more specifically what you mean by
 your question 'to take such action upon the litigation, etc.'
 We assume you are aware that, under date of October 1, 1937, your
 Gentry served on us a written notice that he claimed an attorney's lien
 for 25% of all 'monies, property and assets.'

Your own statement, in your letter, that you would deliver
 to you would be through Mr. Gentry, from having us from the necessity
 of insuring into your hands with him. If you do not want to do
 it that way, of course that is your affair.

In either case we wish it to be clearly understood that we are
 making no use of the Guide and have no desire to use it; that we do not
 wish to retain any of the Guide's books, records, notes, reports, corre-
 spondence, drawings, engravings or photographs, either those owned by
 you or those developed since you entered in our office; and that we have
 no objection to your making use of those materials as you desire. We
 wish you would take them all as promptly as possible; and, as we have
 told you before, we would prefer that you accept delivery before May 1st.

You should be prepared to give us such receipt as you desire for
 will assure us that we need not contact with Mr. Gentry's office for
 lien on account of anything you may receive. Finally, advise us as to
 when you will accept delivery and whether you will accept it personally
 or by representative."

That after the final decree entered on May 12, 1938, in the captioned

Court of Cook County defendant represented to Plaintiff the effect of

delivery to him all the materials and rights by him claimed; that on each

of the occasions and until after the final judgment of the appellate court

the Plaintiff failed and refused to accept defendant's offer, and failed

to provide defendant any protection against his recovery's lien, claimed

by virtue of a notice thereof served on defendant; that during the

pendency of the appeal in the appellate court, Plaintiff remained in the

business of publishing the Guide while he was in the appellate court, but without

knowledge thereof from the defendant until after the final judgment of

the Appellate Court; that shortly after the Appellate Court judgment of

December 15, 1939, Plaintiff started to distribute the Guide and has

been engaged in such guide business and desired said materials therefor, and obtained a waiver of the attorney's lien as to said materials, whereupon defendant surrendered to him all the materials and rights claimed by the plaintiff and executed all of the documents and assignments by plaintiff requested; and defendant concluded its objections by stating that it stood ready to verify the allegations made, and requested that plaintiff be ruled to answer the objections and petition within a short day to be fixed by the court, and that if plaintiff traverse any of the allegations that the defendant be permitted to offer its proof in support thereof. The defendant moved for an order pursuant to the prayer of the petition and also moved that plaintiff be ruled to answer the petition. On June 8, 1940, the court denied the motion of defendant and on the same day entered a decree. The decree overruled the exceptions to the Master's report and entered findings in accordance with the Master's report. The court stated the amount due from the defendant to the plaintiff as salary for three months commencing January 15, 1936, at \$300.00 per month, plus interest thereon at 5% from the time the monthly salary was due until June 4, 1940; and the sum of \$3,000.00 due under the contract for each year commencing May 1, 1936, May 1, 1937, May 1, 1938 and May 1, 1939, plus interest at 5% per annum from each of such dates respectively to June 4, 1940, or a total sum of \$14,648.62. Thereupon the court entered a judgment for plaintiff and against defendant in the sum of \$14,648.62, "together with all costs of this suit, to be taxed by the clerk of this court, including the fee of said Master in Chancery which is hereby fixed at the sum of \$1,307.55, plaintiff's stenographer's charges which were heretofore fixed at the sum of \$360.00, and all other taxable costs herein in said suit." The decree concluded by reserving "jurisdiction in this cause to enter judgment each year for such additional amount, if any, as may be due under the terms of the contract, if defendant continues to use the Hobbs Guide idea and materials. No additional testimony has been heard in the entry of this decree." The defendant filed a direct appeal to the Supreme Court for the purpose of reviewing the last mentioned decree and filed its record, abstract and brief therein. The case was

been engaged in such business and located with material in New York, and obtained a waiver of the attorney's fees as a result of this, whereupon defendant surrendered to him all the materials and rights claimed by the plaintiff and executed all of the documents and assignments plaintiff requested; and defendant conducted the objection by stating that it stood ready to verify the allegations made, and requested that plaintiff be ruled to answer the objection and motion within a short day to be fixed by the court, and that if plaintiff answered any of the allegations that the defendant be permitted to offer its proof in support thereof. The defendant moved for an order pursuant to the order of the court and also moved that plaintiff be ruled to answer the objection. On June 8, 1940, the court denied the motion of defendant and on the same day entered a decree. The decree awarded the possession of the master's report and entered findings in accordance with the plaintiff's report. The court stated the amount due from the defendant to the plaintiff at salary for three months commencing January 1, 1935, at \$100.00 per month, plus interest thereon at 6% from the time the monthly salary was due until June 4, 1940; and the sum of \$1,000.00 for interest on the salary for each year commencing May 1, 1935, May 1, 1937, May 1, 1939 and May 1, 1940, plus interest at 6% per annum from each date until respectively to June 4, 1940, or a total sum of \$14,848.62. Thereupon the court entered a judgment for plaintiff and against defendant in the sum of \$14,848.62, together with all costs of this suit, to be paid by the clerk of this court, including the fee of this action in New York which is hereby fixed at the sum of \$1,000.00, plaintiff's attorney's charges which were heretofore fixed at the sum of \$500.00, and all other taxable costs herein in said suit. The master awarded at receiving "satisfaction in this case to enter judgment with cost for such collection amount, if any, as may be due under the terms of the contract, it is understood continues to use the books and files and material, the plaintiff herein has been barred in the entry of this decree. The defendant filed a motion appeal to the Supreme Court for the purpose of reviewing the last mentioned decree and filed its record, exhibits and brief thereon. The same was

docketed in the Supreme Court as No. 25859. The Supreme Court transferred the case to this court. The record, abstract and appellant's brief were refiled here. Plaintiff filed its brief in this court and defendant filed its reply brief.

The first ~~xxx~~ point urged by defendant is that "the Appellate Court exceeded its jurisdiction in directing judgment to be entered for four successive annual installments of \$3,000.00 each for defendant's supposed use of the guide throughout the successive years from May 1, 1936, until May 1, 1940." The second point is "that part of the Appellate Court mandate directing judgment for \$12,000.00 royalties, being in excess of that court's jurisdiction, and the Superior Court having in its own record no pleadings or evidence whereon to base such a judgment, the decree for that amount is erroneous and constitutes a taking of defendant's property without due process of law." Defendant asserts as a fourth point that "plaintiff having prayed for an accounting and the Appellate Court having established his right thereto, an appropriate decree should have fixed the bases and the conditions of the accounting, and should have directed the taking of proofs pursuant thereto. There was no basis for either the Appellate Court or Superior Court to state the account without such proofs." These points were passed on by us in the previous appeal and were also considered by us when we ruled on the petition for rehearing. They were also considered by the Supreme Court at the time it denied defendant's petition for leave to appeal from our judgment. We infer that the Supreme Court in transferring the instant appeal to this court considered that no constitutional question was involved. Where the direction contained in the mandate of an Appellate Court is precise and unambiguous, it is the duty of the trial court to carry it into execution without looking elsewhere for authority to change its meaning or direction, and where the mandate contains express directions, it is sufficient of itself, unaided or uncontrolled by statements in the opinion. The mandate and not the opinion governs when the mandate differs from the opinion. Fisher v. Burks, 285 Ill. 290; Muhlke v. Muhlke, 285 Ill. 325, 5 C. J. S. Sec. 1965. It is the duty of the trial court, on the case

booked in the Supreme Court as No. 10000. The Supreme Court transferred the case to this court. The record, abstract and summary of the case were filed here. Plaintiff filed his brief in this court and defendant filed his reply brief.

The first point urged by defendant is that the Supreme Court exceeded its jurisdiction in directing judgment to be entered for four successive annual installments of \$1,000 each for defendant's supposed use of the Guide throughout the successive years from May 1, 1904, until May 1, 1940. The second point is that part of the Supreme Court mandate directing judgment for \$12,000.00 rejected, being in excess of that court's jurisdiction, and the Superior Court having in its own record no findings or evidence shown to have been a judgment, the decree for that amount is erroneous and constitutes a taking of defendant's property without due process of law. Defendant asserts as a fourth point that "plaintiff having agreed for an accounting and the defendant Court having established his right thereto, an appropriate decree should have fixed the bases and the conditions of the accounting, and should have directed the taking of profits pursuant thereto. There was no basis for either the Appellate Court or Superior Court to grant the account without such profits." These points were raised on appeal in the previous appeal and were also considered by us when we ruled on the petition for rehearing. They were also considered by the Supreme Court on the appeal denied defendant's petition for leave to appeal from our judgment. We infer that the Supreme Court in transferring the instant appeal to this court considered that no constitutional question was involved. There was direction contained in the mandate of the Supreme Court in which it was unambiguously stated that it is the duty of the trial court to carry out the direction without looking elsewhere for authority to change the meaning or direction and where the mandate contains express directions, it is not for the court itself, unaided or uncontrolled by statements in the opinion. The mandate and not the opinion controls and the court is bound by the mandate. Fisher v. Fisher, 250 Ill. 324; Smith v. Smith, 255 Ill. 302; Ill. 302, 303. It is the duty of the trial court, on the case

being redocketed, to comply with the mandate of the Appellate Court and to obey the directions therein without variation, even though the mandate may be or is supposed to be erroneous. This court's mandate contains express directions and we are of the opinion that the trial court complied therewith.

The third point argued by defendant is that "it was error to include any of the items of interest enumerated in the decree." Under the provisions of Sec. 2 of Chap. 74, Ill. Rev. Stat. 1939, known as the "Interest" statute, creditors are allowed to receive interest at the rate of 5% per annum "for all monies after they become due on any bond, promissory note or other instrument of writing * * *." In the instant case the action was on an instrument of writing. Our view is that the plaintiff is entitled to the interest as allowed in the decree. In its reply brief defendant maintains that "if the Appellate Court mandate was final and binding, then the Superior Court had no power to revise it by adding interest not authorized by the Appellate Court." It will be observed, however, that the mandate, after giving specific directions, also remands the cause "for such other and further proceedings as to law and justice shall appertain." We are of the opinion that under the mandate the trial court properly allowed interest.

The fifth point advanced by defendant is that "it was error to tax Master's fees in this decree." Defendant cites the case of Comstock v. Morgan Park Trust & Savings Bank, 367 Ill. 276, to support its contention. The abstract filed by the defendant omits the Master's certificate of service upon which the trial court acted. The record does not show that defendant objected to the Master's fees in the argument before the Chancellor. We are of the opinion that defendant's contention that it was error to tax the Master's fees in the decree is without merit. Finally, defendant declares that "the decree contains findings not authorized or suggested by the Appellate Court, and not warranted by the

evidence. Wherefore it should be reversed and the cause remanded for further consideration of those elements." We are satisfied that the Chancellor was right in including the findings of the Master in the decree.

For the reasons stated, the decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

7
evidence. Therefore it should be reversed and the case remanded for
further consideration of these elements. It was held that the
Chancellor was right in including the findings of the lower in the
decree.

For the reasons stated, the decree of the Chancellor is
Cook County is affirmed.

W. C. WILSON.

REBEL, T. J. AND DANIEL E. GILLIAM, A. G. GORDON.

PEOPLE OF THE STATE OF ILLINOIS, ex rel,
JOHN S. RUSCH,

Appellee,

v.

MILTON FESTENSTEIN and BARNEY TRACT,

Appellants.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

308 I.A. 673¹

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

The appellants Milton Festenstein and Barney Tract, who were the respondents in the trial court, have set forth their statement of the case substantially as stated here. The petitioner, appellee herein, has taken no exception to the facts as stated by respondents, so we assume them to be correct. They are as follows:

It is alleged that at a primary election held in Chicago on April 12, 1938, the respondent, Milton Festenstein, served as Democratic judge in the 49th precinct of the 24th ward. The respondent, Barney Tract, served as Republican judge. Mildred Klein was the remaining Republican judge, and Molly Cohn and Rose Weinstein were Democratic and Republican clerks respectively.

It is further alleged that these proceedings were originally brought against the entire election board of the precinct under Section 17 of the Primary Law (Ill. Bar. Stats. 1939, Chap. 46, Sec. 381.) On February 16, 1939, a petition was filed in the County Court of Cook County by John S. Rusch, chief clerk of the Board of Election Commissioners. That petition alleged that all the members of the election board were guilty of various types of misconduct. On February 16, 1939, Edmund K. Jarecki, Judge of the County Court of Cook County, entered an order giving leave to file the petition. The order contains recitals concerning various types of alleged misconduct by the members of the board. This order directed that all of the respondents be attached forthwith and committed to jail, unless they gave bond in the sum of \$2,500 each. The order was entered ex parte, without notice to respondents.

The trial of said case was commenced on September 22, 1939, and on that day the respondents filed a petition praying that the cause be assigned to some judge other than the Honorable Edmund K. Jarecki.

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REPORT ON THE STATE OF THE UNION

1997

ILTON PROTESTANT

It is alleged that at a primary election held in Chicago on April 12, 1936, the respondent, Milton Eisenhower, served as Democratic judge in the 49th precinct of the 4th ward. The respondent, having acted, served as Republican judge. Wilson Nixon was the remaining Republican judge, and Kelly Egan and Reed Winfield were Democratic and Republican clerks respectively.

It is further alleged that these proceedings were originally brought against the entire election board of the precinct under section 11 of the primary law (Ill. Rev. Stat. 1905, Chap. 46, Sec. 11). On February 16, 1936, a petition was filed in the County Court of Cook County by John B. Puck, chief clerk of the board of election commissioners. That petition alleged that all the members of the election board were guilty of various types of misconduct. On February 16, 1936, James E. Urecki, Judge of the County Court of Cook County, entered an order giving leave to file the petition. The order contained special provisions various types of alleged misconduct by the members of the board. This order directed that all of the respondents be appointed forthwith and committed to jail, unless they gave bond in the sum of \$5,000 each. The order was entered ex parte, without notice to respondents.

The trial of said case was commenced on January 11, 1937, and on that day the respondents filed a petition praying that the names be stricken from the records of the Court.

That petition was denied. The court heard the testimony of two watchers who had been present at the polling place. The testimony of a handwriting expert was also taken. A lengthy stipulation was entered into by the parties concerning custody of the ballots from the time they were turned over to the Election Commissioners by the respondents. All of the respondents testified in their own behalf and denied the charges.

On September 30, 1939, the court entered a judgment order which order found that Rose Weinstein and Molly Cohen, the clerks, had failed to keep their tally sheets in the manner prescribed by law and by the rules of the Election Commissioners, but the court also found that their failure to do so did not amount to misconduct and misbehavior in their office, and they were discharged. The court also found that Mildred Klein had acted as a judge during the voting but had acted only as a clerk during the canvass of the ballots. The order found that she did not permit or acquiesce in permitting alteration of ballots and that she had purged herself of contempt. She was accordingly found not guilty and discharged.

Milton Festenstein and Barney Tract, judges, were found guilty of

1. Permitting or acquiescing in permitting the precinct captain to assist voters and mark their ballots.

2. Making a false canvass of the votes cast.

3. Permitting or acquiescing in permitting official ballots to be changed, altered or erased.

Milton Festenstein was sentenced to three years in the county jail. Barney Tract was sentenced to serve two years in the county jail.

No point is raised on the pleadings, but it should be noted that the petition did not charge the respondents with permitting illegal alteration of ballots.

The theory of the petitioner is reflected by the judgment order. It contends that the two respondents are guilty of permitting the precinct captain to assist voters, of making a false canvass, and of permitting illegal alterations of official ballots.

Respondents' theory is that the judgment should be reversed for the following reasons:

That petition was denied. The court denied the petition of the respondent who had been present at the polling place. The petition of a respondent expert was also denied. A lengthy stipulation was entered into by the parties concerning custody of the ballots from the time they were turned over to the Election Commission by the respondent. All of the respondents testified in their own behalf and denied the charges.

On September 30, 1938, the court entered a judgment which order found that respondent and only respondent, the respondent, failed to keep their tally sheets in the manner prescribed by the rules of the Election Commission, and that a very large number of their failure to do so did not amount to misconduct and misbehavior in their office, and they were discharged. The court also found that respondent had acted as a judge during the voting but did not enter only as a clerk during the canvass of the ballots. The court found that respondent was guilty of misconduct in permitting alteration of ballots and that the respondent or someone in permitting alteration of ballots and that the respondent himself of contempt. She was accordingly found not guilty and discharged. Milton Festerstein and Ernest West, judges, were found guilty of 1. Permitting or acquiescing in permitting the respondent to assist voters and mark their ballots.

2. Making a false canvass of the votes cast.
3. Permitting or acquiescing in permitting official ballots to be changed, altered or erased.

Milton Festerstein was sentenced to three years in the county jail. Barney West was sentenced to serve two years in the county jail. No point is raised on the findings, but it should be noted that the petition did not charge the respondents with permitting illegal alteration of ballots.

The theory of the petition is rejected by the judgment entry. It contends that the two respondents are guilty of permitting the respondent to obtain to assist voters, of making a false canvass, and of permitting illegal alterations of official ballots.

Respondents' theory is that the judgment should be reversed for the following reasons:

1. Respondents were not given a fair and impartial trial.

The trial judge was disqualified from hearing the case.

2. The County Court exceeded its jurisdiction by opening the ballot box and examining the contents thereof and receiving the ballots in evidence more than six months after the primary with no election contest pending.

3. The finding and judgment of the trial court are contrary to the evidence.

The first question presented to us for consideration is: Was the trial judge disqualified? In considering such question we call attention to Case No. 41386, Appellate Court, First District of Illinois, entitled, People of the State of Illinois, ex rel. John S. Rusch, Appellee v. Henry Levin, Minnie Hirsch, Lillian Rothstein, Bertha Schallman, Joseph Rosenfeld, Appellants, wherein the same charge was made relative to the trial judge who was a candidate in that same primary election. In that case this court cited from the case entitled, People of the State of Illinois, ex rel John S. Rusch, Appellee v. Margaret Cunningham, et al., Appellate Court No. 40896, wherein it was said:

"The record in the instant case discloses an unusual and novel situation. The trial judge was a candidate for renomination by his party at the same primary at which it is alleged respondents were guilty of misconduct. Their alleged acts of misbehavior directly affected his candidacy. It was charged that defendants as officials acquiesced in the conduct of persons who erased the crosses on ballots in the square before the name of the trial judge and made crosses in the square opposite the name of his opponent. It is manifest the trial judge was intensely interested in these alleged actions. We have recited the facts, and comment, we think, is not required. There was no reason why the cases against these respondents should not have been tried by another judge. We hold the record shows he was disqualified."

There will be no necessity of considering the other allegations of error. Having reached the same conclusion as was reached in the case from which we have just quoted, the judgment of the County Court is hereby reversed and the cause is remanded with directions to transfer the hearing of this cause to some other judge.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND BURKE, J. CONCUR.

1. Respondents were not given a fair and impartial trial.

The trial judge was disqualified from hearing the case.

2. The County Court ordered the jurisdiction to be opened for ballot box and examining the contents thereof and receiving the ballot in evidence more than six months after the entry into the election contest pending.

3. The finding and judgment of the trial court are contrary to the evidence.

The first question presented to be for consideration is: Was the trial judge disqualified? In considering such question we call attention to Case No. 41822, People of the State of Illinois, ex rel. John E. Walsh, Appellate Court No. 40392, wherein the same charge was made relative to the trial judge who was a candidate in that same primary election. In that case this court cited from the case entitled, People of the State of Illinois, ex rel. John E. Walsh, Appellate Court No. 40392, wherein it was said:

"The record in the instant case discloses an unusual and novel situation. The trial judge was a candidate for reelection at the same primary at which it is alleged respondents were elected to candidacy. Their alleged acts of disloyalty directly affected the conduct of persons who were the contestants in the election contest. The name of the trial judge and name of one of the contestants are identical. It is manifest that the trial judge was personally interested in these alleged matters. He was voting the same, and comment, we think, is not required. There was no reason why the name of the trial judge should not have been given by the respondents. To hold the record shows he was disqualified."

There will be no necessity of considering the other allegations of error. Having reached the same conclusion as was reached in the case from which we have just quoted, the judgment of the County Court is reversed and the cause is remanded with directions to transfer the matter of this cause to some other judge.

JOSEPH W. BROWN, JR. and others,
Plaintiffs in Error,
vs.
JOHN E. WALSH, Defendant.

RECEIVED, P. O. AND COURT, J. COURT.

41234

CHICAGO TITLE AND TRUST COMPANY, as Trustee
under Trust Deed dated November 15, 1925, re-
corded as Document No. 9117122,

(Plaintiff) and Appellee,

v.

TWO-O-ONE EAST DELAWARE PLACE BUILDING COR-
PORATION, a corporation, et al.,

Defendants.

MINNIE H. CASE,
(Petitioner) and Appellant,

v.

CHICAGO TITLE AND TRUST COMPANY, as Trustee
under Trust Deed November 15, 1925, recorded
as Document No. 9117122, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

308 I.A. 673²

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

From the conflicting statements presented to us by the various parties in this case, we have decided to set forth the following as a statement of facts.

On July 30, 1936, a complaint was filed to foreclose a first trust deed for \$925,000.00, securing 1,684 bonds. The complaint alleges interest on the bonds maturing on or prior to May 15, 1933, all paid. The defaults alleged consisted of failure to deposit money as interest November 15, 1933, \$9,457.50, and also defaults in payment of interest due May 15, 1934, November 15, 1934, May 15, 1935, November 15, 1935, May 15, 1936 and pre-payments due November 15, 1935 and May 15, 1936. Also defaults alleged on payment of taxes 1928, 1929, 1930 and second installment on 1934. The complaint alleges that bonds No. 1510 to 1684 amounting to \$175,000.00 subordinated; second mortgage bonds of \$175,000.00. The complaint makes as exhibits alleged agreement for extension dated May 31, 1932, assignments of rents of same date, bill of sale of same date and alleged declaration of trust dated June 15, 1932.

CHICAGO TITLE AND TRUST COMPANY, as Trustee
under Trust Deed Dated November 15, 1933, re-
corded as Document No. 21712, at 11.

(Plaintiff) and Respondent,

vs.

TWO-C-ONE EAST CHICAGO L. O. B. L. O. CO.
INCORPORATED, a corporation, at 11.

Respondent.

MIRIAM H. GALT,
(Defendant) and Respondent,

vs.

CHICAGO TITLE AND TRUST COMPANY, as Trustee
under Trust Deed Dated November 15, 1933, recorded
as Document No. 21712, at 11.

Respondent.

MR. JUSTICE DENNIS E. KELVIN, CHIEF JUSTICE OF THE COURT.

From the conflicting statements presented to me by the

various parties in this case, we have decided to set forth the following

as a statement of facts.

On July 30, 1935, a complaint was filed as follows:

Trust deed for \$225,000.00, executed 1, 1933, at 11.

Interest on the bonds maturing on or prior to May 15, 1935, at 11.

The deficits alleged consisted of failure to deposit money as interest

November 15, 1933, \$1,457.50, and also deficits in payment of interest

due May 15, 1934, November 15, 1934, May 15, 1935, November 15, 1935,

May 15, 1936 and pre-payments due November 15, 1935 and May 15, 1936.

Also deficits alleged on payment of taxes 1933, 1934, 1935 and 1936.

Installment on 1934. The complaint alleged that money of \$110.40 1934

amounting to \$175,000.00 undeposited; second mortgage bonds of

\$175,000.00. The complaint asked for equitable relief, judgment for

extension dated May 31, 1935, judgment of costs of this case, and

of sale of same lots and alleged deficiency of trust funds due 15, 1935

The complaint further alleges legal title to furniture in building in Robert P. Nessler for the benefit of those named in the trust deed of date June 15, 1932; that all conditions precedent have been performed by the Chicago Title and Trust Company, as trustee; that at the time of said extension, bonds 91-166 amounting to \$57,000.00 was extended by endorsement thereon until November 15, 1940.

The complaint further alleges that on February 15, 1935, plaintiff as trustee served on the mortgagor and Robert P. Nessler a written notice of defaults dated February 11, 1935.

The complaint further alleges that first trust deed constitutes a first, prior and paramount lien upon all the lands and property mortgaged conveyed thereby and upon all the rents, issues and profits thereof.

The complaint further alleges dissolution by attorney general of State of Illinois of 201 E. Delaware Place Building Corporation.

The complaint prays (k) "That the court find by its decree that said Robert P. Nessler is vested with legal title to the goods, chattels and property, furniture, furnishings, fixtures and equipment located in the building commonly known as Two-0-One E. Delaware Place Building Corporation and more fully described in the bill of sale dated May 31, 1932 (Exhibit IV hereof) for the ultimate use and benefit of the parties described and set forth in the Declaration of Trust dated June 15, 1932, executed by said Robert P. Nessler (Exhibit V hereof) in the order of priority as therein listed and described."

The only contest in this case comes, we gather, from the answer and petition of Minnie H. Case and Charles F. Henry. On September 5, 1936, the joint answer of Minnie H. Case, Charles F. Henry, Howard D. Henry and Louise Henry and 201 E. Delaware Place Building Corporation was filed, the last named defendant being the owner of the fee and the maker of the bonds. The answer denies that Robert P. Nessler, as trustee, is the owner of all the goods, chattels and property specified in paragraph 14 of the complaint, for the use of the persons specified in paragraph 15 of the complaint, and set forth in Exhibit V of the

The complaint further alleges that title to the building in Robert T. Healey for the benefit of those named in the trust deed of date June 18, 1932; that all conditions precedent have been performed by the Chicago Title and Trust Company, Inc.; that at the time of said extension, bonds 21-125 amounting to \$17,000.00, was extended by endorsement thereon until November 1, 1933.

The complaint further alleges that on February 12, 1934, plaintiff as trustee served on the mortgagee and Robert T. Healey a written notice of default dated February 11, 1934.

The complaint further alleges that title to the land and property a first, prior and paramount lien upon all the lands and property mortgaged conveyed thereby and upon all the rents, issues and profits thereof.

The complaint further alleges dissolution of Chicago Title and Trust Company of State of Illinois of 201 N. Delaware Street Building, Chicago, Illinois.

The complaint prays (1) "That the court find by its decree that said Robert T. Healey be vested with legal title to the lands, chattels and property, furniture, furnishings, fixtures and equipment located in the building commonly known as 201-203 N. Delaware Street Building Corporation and serve fully described in the Bill of Sale dated May 31, 1932 (Exhibit IV hereto) for the ultimate use and benefit of the parties described and set forth in the Declaration of Trust dated June 18, 1932, executed by said Robert T. Healey (Exhibit V hereto) in the order of priority as therein listed and numbered."

The only contest in this case is, as between, from the answer and petition of James E. Gray and Charles E. Gray, on the one hand, and D. Henry and Louise Henry and 201 N. Delaware Street Building Corporation, on the other, the joint answer of James E. Gray, Charles E. Gray, Henry and Louise Henry and 201 N. Delaware Street Building Corporation was filed, the last named defendant filing the answer of the two and the order of the bonds. The answer denies that Robert T. Healey, as trustee, is the owner of all the goods, chattels and property specified in paragraph 14 of the complaint, for the use of the persons specified in paragraph 15 of the complaint, and set forth in Exhibit V on the

complaint, but alleges the fact to be that Minnie H. Case is the owner of such property, and has the present right of possession and use of the same; that the defendants have no knowledge of the execution and delivery of trust instrument (Exhibit V) and therefore deny the execution and delivery of the same. Minnie H. Case claims ownership of the furniture, furnishings and equipment contained in the building known as 201 E. Delaware Place Building, as aforesaid.

On November 6, 1936, the notice and petition of Minnie H. Case was filed and said petition alleges that she is one of the defendants; that the trustee filed its complaint as amended to foreclose the first mortgage trust deed; that on August 8, 1936, Frank C. Rathje was appointed receiver of the property and premises, which premises are improved with a sixteen story building, including a penthouse on the roof of said building which contains seven rooms now occupied by petitioner; that she was at the time of the filing of the original bill of complaint, and is now, in possession of the penthouse and is not paying any rent therefor to said receiver; that there are 127 family units in the building, approximately 65 of which were furnished and rented as furnished apartments or units; that the furnishings and equipment of approximately 65 apartments were then and still are the property of said Minnie H. Case; that under the agreement dated May 31, 1932, it was agreed that:

(a) The "First Mortgage Trustee" (subject to procuring the consent of the holders of bonds numbered 91-166, and the consent of not less than 75% of the legal holders of all other unpaid and outstanding bonds of said first mortgage issue) agrees to cause the indebtedness evidenced by bonds numbered 91-166 both inclusive, as described in and secured by the trust deed hereinbefore referred to, to be extended (subject to the provisions thereof) by endorsement thereon until November 15, 1940.

(d) The owner agrees to sell, warrant, assign and transfer to Robert P. Nessler (therein mentioned as trustee) good and clear title to all the personal property then located in the mortgaged property, excepting only the personal property, furniture, furnishings and equipment owned by this defendant located in the bungalow on the roof of said premises, by Bill of Sale containing the terms as set forth therein and the document attached thereto, marked Exhibit "B" (which exhibit is expressly made a part of said extension agreement.)

It is claimed by the said defendant Minnie H. Case that it was the intention of the parties to said extension agreement to place Robert P. Nessler, as trustee in possession of the mortgaged property,

for the benefit, first of the unsubordinated first mortgage bondholders, second of the subordinated first mortgage bondholders, and third, of the second mortgage bondholders, and that all principal payments of the first mortgage up to and including November 15, 1934, might be extended so that only interest might be payable on such unsubordinated first mortgage bonds during the next three years and might be payable only out of earned income derived from the operation of the mortgaged property and to the extent that said interest is not now paid out of earnings, it might be capitalized as additional principal due November 15, 1940; that the second mortgage principal might be extended until November 15, 1940, and that interest during the next three years might likewise be capitalized as additional principal due at said time, and that said Robert P. Nessler, as Trustee, under the Assignment of Rents, (therein more specifically referred to) might be authorized to apply the net income derived from the mortgaged premises as provided by the terms of said extension agreement.

Said petitioner Minnie H. Case further claims that said premises were turned over to said Robert P. Nessler and that all of the rents, income, issues and profits therefrom were taken out of her hands; that there was no default; that said extension agreement was not carried out and that the consideration failed; that there was no consideration for the delivery of all her right, title and interest in and to the furnishings and equipment contained in approximately 65 apartments located in said premises, namely, 201 East Delaware Place; that neither plaintiff nor the receiver has any right, title or interest therein; that the equitable right, title, claim and interest in same is in said Minnie H. Case and that the legal title thereto was then and is still vested in Robert P. Nessler, as trustee.

It appears from the evidence that Minnie H. Case, the petitioner, owned part of the furniture in the building in question which contained 127 family units, approximately 65 of which were furnished; that she also owned in excess of 95% of the stock of the building corporation which

owned title to the building; that the income was not sufficient to pay the interest on the bond issue and taxes; that apparently all interested parties entered into an agreement in 1932 for the extension of the foreclosure period until the year 1940, and pursuant to this understanding they entered into the following agreement:

"WITNESSETH:

Whereas, the party of the first part is the owner of the equity of redemption in and to the real estate and premises situated in the City of Chicago, County of Cook and State of Illinois, commonly known as '201 East Delaware Place', and known by legal description as:

Lots thirteen (13) and fourteen (14) in Lake Shore Drive Addition to Chicago, a subdivision of parts of blocks fourteen (14) and twenty (20) in Canal Trustees' Subdivision of the South fractional quarter of Section three (3) Township thirty-nine (39) North, Range fourteen (14), East of the Third Principal Meridian, in the City of Chicago, County of Cook and State of Illinois; and

Whereas, said premises are presently subject to the lien of a first mortgage from the party of the first part to Chicago Title and Trust Company, as Trustee, which trust deed is dated November 15, 1925, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on December 7, 1925, as Document No. 9117122, securing the payment of an issue of first mortgage bonds for the aggregate sum of \$925,000.00 upon which there remains an unpaid balance of \$860,500.00, with interest thereon at the rate of 8% per annum, reference to which trust deed and to all the terms thereof is hereby expressly made; and

Whereas, a portion of the bonds described in and secured by said first mortgage trust deed aggregating \$175,000.00 have been subordinated by endorsement thereon to the remaining outstanding bonds of said issue aggregating \$685,500.00; and

Whereas, said premises are also subject to the lien of a certain second mortgage trust deed from the party of the first part to Chicago Title and Trust Company, as Trustee, which trust deed is dated November 15, 1925, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on December 18, 1925, as Document No. 9128500, and which trust deed secures the payment of an issue of second mortgage bonds aggregating the principal sum of \$175,000.00 upon which there remains a present unpaid balance of \$110,000.00, with interest at the rate of 6 1/2% per annum, reference to which trust deed and to all the terms thereof is hereby expressly made; and

Whereas, the income presently derived from the operation of the mortgaged premises has been and is insufficient to pay all accruing taxes and assessments and principal and interest on the encumbrances; and

Whereas, a large portion of the 1927 general taxes levied against the mortgaged premises remain unpaid, and the general taxes levied for the years 1928, 1929, 1930, and subsequent years likewise remain unpaid; said unpaid taxes being substantially as follows;

| | |
|--|-------------|
| Balance due 1927 general taxes | \$ 9,980.00 |
| and interest and penalties. | |
| 1928 general taxes | 18,687.12 |
| and interest and penalties. | |
| 1929 general taxes | 22,135.76 |
| and interest and penalties. | |
| 1930 general taxes (estimate) | 18,000.00 |

Whereas, the 'Owner' has defaulted in the payment of the principal and interest due May 15, 1932, on the first mortgage; and in the payment of the principal and interest due May 15, 1932, on the second mortgage; and

Whereas, the 'Owner' and the 'First Mortgage Trustee' and the 'Second Mortgage Trustee' and Lawrence Stern & Company, as the

owned title to the building; that the income was not sufficient to pay the interest on the bond issue and taxes; that accordingly all interested parties entered into an agreement in 1922 for the extension of the foreclosure period until the year 1930, and pursuant to this understanding they entered into the following agreement:

"Witnesseth:

Whereas, the party of the first part is the owner of the equity of redemption in and to the real estate and premises situated in the City of Chicago, County of Cook and State of Illinois, commonly known as '201 East Delaware Place', and known by lot of subdivision as: Lots thirteen (13) and fourteen (14) in Lake Shore Drive Addition to Chicago, a subdivision of parts of blocks fourteen (14) and twenty (20) in General Trusts' subdivision of the south fractional quarter of Section three (3) Township thirty-nine (39) North, Range fourteen (14), East of the Third Principal Meridian, in the City of Chicago, County of Cook and State of Illinois; and Whereas, said premises are presently subject to the lien of a first mortgage from the party of the first part to Chicago Title and Trust Company, as Trustee, which trust deed is dated November 12, 1923, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on December 7, 1923, as Document No. 911132, securing the payment of an issue of first mortgage bonds for the sum of \$1,000,000.00 upon which there remains an unpaid interest of \$12,000.00, with interest thereon at the rate of 6% per annum, reference to which trust deed and to all the terms thereof is hereby expressly made; and Whereas, a portion of the bonds described in and secured by said first mortgage trust deed aggregating \$12,000.00 have been repaid by endorsement thereon to the remaining outstanding bonds of said issue aggregating \$88,000.00; and Whereas, said premises are also subject to the lien of a certain second mortgage trust deed from the party of the first part to Chicago Title and Trust Company, as Trustee, which trust deed is dated November 12, 1923, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on December 10, 1923, as Document No. 9128500, and which trust deed secures the payment of an issue of second mortgage bonds aggregating the principal sum of \$1,000,000.00, with interest thereon at the rate of 6% per annum, reference to which trust deed and to all the terms thereof is hereby expressly made; and Whereas, the income presently derived from the operation of the mortgaged premises has been and is insufficient to pay all mortgage taxes and assessments and interest on the mortgages; and Whereas, a large portion of the 1927 General taxes levied on the mortgaged premises remain unpaid, and the General taxes levied for the years 1928, 1929, 1930, and subsequent years likewise remain unpaid; said unpaid taxes being substantially as follows:

| | |
|--|------------|
| Balance due 1927 General taxes | \$1,500.00 |
| and interest and penalties | 12,000.00 |
| 1928 General taxes | 12,000.00 |
| and interest and penalties | 12,000.00 |
| 1929 General taxes | 12,000.00 |
| and interest and penalties | 12,000.00 |
| 1930 General taxes (estimated) | 12,000.00 |

Whereas, the 'Owner' has defaulted in the payment of the principal and interest on the first mortgage; and in the payment of the principal and interest on the second mortgage; and Whereas, the 'Owner' and the first mortgage trustee, and the 'Second Mortgage Trustee', and Lawrence Stern & Company, as the

underwriter, are all desirous of effecting a readjustment of the payments required to be made by the 'Owner' on the existing mortgages so as to permit the application of a large portion of the income derived from the operation of the mortgaged property for the payment of delinquent taxes; and

Whereas, all of the parties hereto believe it to be to their respective best interests to extend certain prepayments and capitalize certain interest payments in order to avert the necessity of immediately instituting foreclosure proceedings on the mortgages; and

Whereas, heretofore on, to wit, the 23rd day of January, A. D. 1932, the 'Owner' did execute and deliver an Assignment of Rents to Robert P. Nessler, as Trustee, transferring all the rents, income and profit derived from the operation of the mortgaged property for the use and benefit of the first and second mortgages; and

Whereas, said Robert P. Nessler has ever since January 23rd, 1932, been in possession of the mortgaged property as Trustee under said assignment and has collected the rents, issues and profits therefrom, and has available for distribution at this time a sum in excess of \$24,000.00, which sum the parties desire to apply in accordance with the provisions hereof; and

Whereas, M. H. Case is the owner of certain personal property, furniture, furnishings and equipment located in the mortgaged property and is desirous of conveying said furniture as consideration for the extension of principal and the capitalization of interests herein granted by the first and second mortgagees to the 'Owner.'

Now, Therefore, in consideration of the premises, and in further consideration of the mutual covenants and agreements hereinafter contained, the parties hereto covenant and agree as follows:

The preambles and recitals of this agreement are expressly made a part of the covenants hereof, and this agreement is to be construed in the light thereof.

First: The 'First Mortgage Trustee' (subject to procuring the consent of holders of bonds numbered 91 to 166, both inclusive, and the consent of not less than 75% of the legal holders of all other unpaid and outstanding bonds of said first mortgage issue, agrees to cause the indebtedness evidenced by bonds numbered 91 to 166, both inclusive, as described in and secured by the trust deed recorded as Document No. 9117122, which bonds aggregate the principal sum of \$57,000.00 and mature serially beginning May 15, 1932, and ending November 15, 1934, to be extended (subject to the provisions hereof) by endorsement thereon until November 15, 1940.

Second: The 'Banker' agrees to procure the approval of the legal holders of all the subordinated first mortgage bonds to this agreement, and further agrees that said holders will consent to forego the payment of interest on said subordinated first mortgage bonds for a period of three years (except as earned from the operation of the mortgaged property), and to capitalize all interest not so paid out of earnings as additional principal due November 15, 1940.

Third: The 'Second Mortgage Trustee' (subject to procuring the consent of all the legal holders of the unpaid and outstanding bonds of said second mortgage issue) agrees to cause the maturity of all the remaining outstanding and unpaid bonds of said issue, to wit, bonds numbered 83 to 222, both inclusive, for the aggregate principal sum of \$110,000.00, which mature serially beginning May 15, 1932, and ending November 15, 1935, to be extended (subject to the provisions hereof) by endorsement thereon until November 15, 1940.

Fourth: The 'Banker' agrees to procure the approval of the legal holders of all the second mortgage bonds to this agreement, and further to procure their consent to forego the payment of all interest for a period of three years and to capitalize said interest as additional principal due November 15, 1940.

underwriter, are all desirous of effecting a replacement of the mortgage required to be made by the 'Owner' on the existing mortgage as so permitted the application of a large portion of the income derived from the operation of the mortgaged property for the payment of delinquent taxes; and

Whereas, all of the parties hereto believe it to be in their respective best interests to extend certain payments and installments certain interest payments in order to avert the necessity of instituting foreclosure proceedings on the mortgage; and

Whereas, heretofore on, to wit, the 1st day of January, 1932, the 'Owner', did execute and deliver an assignment of parts to Robert P. Nesbitt, as Trustee, transferring all the rents, issues and profits derived from the operation of the mortgaged property for the use and benefit of the first and second mortgages; and

Whereas, said Robert P. Nesbitt has ever since January 1st, 1932, been in possession of the mortgaged property as Trustee under said assignment and has collected the rents, issues and profits therefrom, and has available for distribution at this time a sum in excess of \$4,000.00, which sum the parties desire to apply in accordance with the provisions hereof; and

Whereas, M. H. Case is the owner of certain personal property, furniture, furnishings and equipment located in the mortgaged property, and is desirous of conveying said furniture as collateral for the extension of principal and the capitalization of interest herein granted by the first and second mortgages to the 'Owner';

Now, Therefore, in consideration of the mutual covenants and agreements herein contained, the parties hereto covenant and agree as follows:

The premises and recitals of this agreement are expressly made a part of the covenants hereof, and this agreement is to be construed in the light thereof.

First: The 'First Mortgage Trustee' (subject to removal the consent of holders of bonds numbered 81 to 122, both inclusive, and the consent of not less than 75% of the bondholders of all other units and outstanding bonds of said first mortgage trust, subject to removal the indebtedness evidenced by bonds numbered 81 to 122, both inclusive, as described in and secured by the trust deed recorded as Document No. 317122, which bonds mature serially beginning May 15, 1932, and on the 15th day of November 15, 1940, to be extended (subject to the provisions hereof) by endorsement thereof until November 15, 1940.

Second: The 'B' Trust' agrees to procure the removal of the legal holders of all the subordinated first mortgage bonds to this agreement, and further agrees that said holders will consent to the payment of interest on said subordinated first mortgage bonds for a period of three years (except as waived from the operation of the mortgaged property), and to capitalize all interest not so paid out of earnings as additional principal on November 15, 1940.

Third: The 'Second Mortgage Trust' (subject to removal the consent of all the legal holders of the units and outstanding bonds of said second mortgage issues) agrees to cancel the maturity of all the remaining outstanding and unpaid bonds of said trust, to wit, bonds numbered 83 to 222, both inclusive, for the aggregate principal sum of \$110,000.00, which mature serially beginning May 15, 1932, and ending November 15, 1935, to be extended (subject to the provisions hereof) by endorsement thereof until November 15, 1940.

Fourth: The 'Owner' agrees to procure the removal of the legal holders of all the second mortgage bonds to this agreement, and further to procure their consent to forego the payment of all interest for a period of three years and to capitalize said interest as additional principal on November 15, 1940.

Fifth: The 'Owner' does hereby authorize and direct Robert P. Nessler, Trustee under the Assignment of Rents of January 23, 1932, to disburse the moneys on hand, first, to the payment of interest due May 15, 1932, on the unsubordinated first mortgage bonds and the balance to the payment of the interest due May 15, 1932, on the subordinated first mortgage bonds.

The 'Owner' in consideration of extensions hereinabove granted agrees:

(a) To execute a Trust Indenture in the nature of a surrender of possession and an assignment of all rents, income, issues and profits derived from the operation of the mortgaged property to Robert P. Nessler, as Trustee, which Indenture will be in form substantially as set forth in Exhibit 'A' attached hereto and which exhibit is expressly made a part of this agreement; and to place said Robert P. Nessler in actual possession of the mortgaged property.

(b) To execute and deliver such additional interest coupons as may be necessary to evidence the installments of interest due on the several mortgages during said extended period, and to execute and deliver such other and different documents as may be reasonably required by the other parties hereto to carry out the terms of this agreement.

(c) To execute an assignment to Robert P. Nessler, as Trustee under said Assignment of Rents, of all assessments levied by the owner as against its stockholders and cooperative owners, and to assign existing leases with tenants to said Robert P. Nessler, as Trustee.

(d) To cause M. H. Case to sell and warrant, assign and transfer to Robert P. Nessler good and clear title to all the personal property now located in the mortgaged property, excepting only the personal property, furniture, furnishings and equipment owned by M. H. Case located in the bungalow, by Bill of Sale containing the terms as set forth in the document attached hereto and marked Exhibit 'B' and which exhibit is expressly made a part of this agreement, and to deliver actual possession of said personal property to said Robert P. Nessler.

It is the intention of the parties hereto by this agreement to place Robert P. Nessler, as Trustee, in possession of the mortgaged property for the benefit, first, of the unsubordinated first mortgage bondholders; second, of the subordinated first mortgage bondholders, and third, of the second mortgage bondholders; that all principal payments on the first mortgage up to and including November 15, 1934, may be extended so that only interest may be payable on said unsubordinated first mortgage bonds during the next three-year period; that interest on the subordinated first mortgage bonds during the next three years may be payable only out of earned income derived from the operation of the mortgaged property and to the extent that said interest is not paid out of earnings it may be capitalized as additional principal due November 15, 1940; that the second mortgage principal may all be extended until November 15, 1940, and that interest during the next three years may likewise be capitalized as additional principal due at said time; that Robert P. Nessler, as Trustee under the Assignment of Rents hereinabove more fully referred to, may be authorized to apply the net income derived from the operation of the mortgaged property as follows:

During the first year, first, \$20,000 to the payment of unpaid general and special taxes and assessments; then to the payment of interest on the unsubordinated first mortgage bonds; then \$10,000 to the further payment of unpaid general and special taxes and assessments; then to the payment of interest then due on the subordinated first mortgage bonds, and any surplus to the further reduction of the delinquent unpaid taxes. During the subsequent years, first, \$30,000 annually to the payment of unpaid general and special taxes and assessments; then to the payment of interest on the unsubordinate first mortgage bonds; then to the payment of interest then due on the subordinated first mortgage bonds, and any surplus to the further reduction of the

balance to the payment of the interest due May 15, 1932, on the subordinated first mortgage bonds.

The 'Owner' in consideration of certificate and above

Printed by

(b) To execute a Trust instrument in the future of a corporation or partnership and an assignment of all rights, interests, and profits derived from the operation of the corporation, property to Robert F. Hessler, as Trustee, which instrument will be in form substantially as set forth in Exhibit A attached hereto and to which exhibit is expressly made a part of this agreement; and to cause said Robert F. Hessler in actual possession of the property to deliver and deliver with all interest and profits derived from the operation of the corporation, and to execute the several mortgages during said extended period, and to execute and deliver such other and different documents as may be required by the other parties hereto to carry out the terms of this agreement.

(c) To execute an assignment of the right of all assets having priority under said assignment of the owner as against its assignee, and assign existing leases with tenants to said assignee.

(d) To cause M. H. Deas to sell or convey, assign and transfer to Robert J. Nealee Wood and after title to all the real and personal property now located in the County of ... State of ... only the personal property, furniture, ... and ... owned by M. H. Deas located in the ... of the ... the terms as set forth in the document attached hereto and a ... Exhibit 'B' and which exhibit is ... and a ... ment, and to deliver actual possession of all personal property ... to said Robert J. Nealee.

It is the intention of the parties hereto by this instrument to place Robert F. Neasey, as trustee, in possession of the mortgaged property for the benefit, first, of the subordinated first mortgage bondholders; second, of the subordinated first mortgage bondholders; and third, of the second mortgage bondholders; that all principal due on the first mortgage as to and including November 15, 1940, may be extended so that only interest may be payable on this subordinated first mortgage bond during the next three years; that interest on the subordinated first mortgage bond during the next three years may be payable only out of earned income received from the operation of the mortgaged property and to the extent that said interest is not paid out of earnings it may be as limited as additional principal on November 15, 1940; that the second mortgage principal may all be repaid until November 15, 1940, and that interest during the next three years may likewise be capitalized as additional principal on said date; that Robert F. Neasey, as trustee under the deed of trust herein, have more fully referred to, may be authorized to accept the net income derived from the operation of the mortgaged property as follows:

delinquent unpaid taxes, or upon payment of all current and delinquent taxes, to the prepayment of such extended first mortgage bonds numbered 91 to 186, both inclusive, at par and accrued interest in the order of their original maturities, that is to say, first, those bonds which matured by their terms on May 15, 1932, and being numbered 91 to 102, both inclusive, are to be retired; then after the retirement in full of said bonds to the retirement of bonds numbered 103 to 114, both inclusive, due by their terms on November 15, 1932, and in like manner the remaining extended bonds in the order of their maturity. Such retirement shall be made on May 15th in each year and in case the funds applicable towards the retirement of outstanding bonds shall at any time be insufficient to retire any maturity as aforesaid in full, the bonds of such maturity to be paid are to be selected by lot by the first mortgage trustee.

The accounting period required by this agreement shall commence as of June 15, 1932, and for the purpose of determining whether default exists hereunder interest on the indebtedness secured by the mortgages shall be considered as due thirty days after their actual due date.

M. H. Case executes this agreement for the purpose of evidencing her agreement to the sale of the personal property, furniture, furnishings and equipment located in the mortgaged premises to Robert P. Nessler as a part of the consideration paid to the parties hereto for the extensions and indulgences herein granted to Two-C-One East Delaware Place Building Corporation. It is expressly understood that if the 'Owner' or the said M. H. Case, or any person, firm or corporation claiming by, through or under them, or under them, or their heirs, executors, administrators, successors or assigns, should at any time interfere with the possession of Robert P. Nessler, as Trustee, of the mortgaged property, or with the possession of Robert P. Nessler of said personal property or by any legal proceedings, or otherwise, assert the invalidity of any provisions hereof, or of the Assignment of Rents or Bill of Sale herein provided for, then the extensions and indulgences granted to the 'Owner' by the 'First Mortgage Trustee' and 'Second Mortgage Trustee' shall automatically be and become terminated and revoked and the maturity dates of said extended bonds shall automatically revert to conform with the schedules on the original trust deeds.

Nothing herein contained shall be construed as a waiver by the 'First Mortgage Trustee' or 'Second Mortgage Trustee', or by the holders of the bonds secured by said trust deeds, of any of their respective rights, powers or privileges under said trust deeds except as herein expressly modified by the terms hereof; it being the intention of all parties hereto to hereby ratify and confirm all of the provisions of said trust deeds, as modified by the extension of the time of payment of certain principal and the capitalization of certain installments of interest, as hereinabove more fully set forth, and otherwise. If the 'Owner' shall default in the performance, of any of the covenants herein contained upon its part to be performed, and or if any action is brought or threatened against the 'Owner' which is likely to interfere with the operation of the mortgaged property by Robert P. Nessler or his possession thereof or of the personal property, or the carrying out of this agreement, or if at any time within the next three years the annual net income derived from the operation of the mortgaged property, after payment of operating expenses, is insufficient to provide for the application of \$30,000 to the payment of unpaid general and special taxes and assessments (except that during the first year only \$20,000 need be applied to the payment of taxes), and to pay the interest on the unsubordinated first mortgage bonds, then at the election of the Chicago Title and Trust Company, as agent for the unsubordinated first mortgage bond holders, the extension herein granted to the 'Owner' by the 'First Mortgage Trustee' and 'Second Mortgage Trustee' shall be and become terminated and revoked and of no further force and effect, and the maturity dates of said extended bonds shall

automatically revert to conform with the schedules in the original trust deeds; and said bonds and trust deeds shall be and remain in full force and effect as if this agreement had never been executed. It is expressly understood, however, that in case of default by the 'Owner' that the 'Second Mortgage Trustee' or the bondholders thereunder, or the subordinated first mortgage bondholders, shall have and they are hereby expressly given the right to cure any default of the 'Owner' in order to continue the operation of this agreement, in so far as it affects the right of the Chicago Title and Trust Company, as agent for the unsubordinated first mortgage bondholders to declare this agreement cancelled.

This agreement shall be binding upon and inure to the benefit of all the parties hereto, their respective heirs, executors administrators, successors, legal representatives and assigns.

It is Expressly Understood that the extended first mortgage bonds shall bear interest at the rate of 6% per annum during the extended period, and the extended second mortgage bonds shall bear interest at the rate of 6½% per annum, and that said interest shall be payable semi-annually at the same time and in the same place as interest on the remaining bonds.

In Witness Whereof, said Two-O-One East Delaware Place Building Corporation; Chicago Title and Trust Company, not individually but as Trustee under Trust Deed recorded as Document No. 9117122; Chicago Title and Trust Company, not individually but as Trustee under Trust Deed recorded as Document No. 9128500, and Lawrence Stern & Company have caused these presents to be executed by their respective officers thereunto duly authorized, and their respective corporate seals to be hereunto affixed and M. H. Case, has hereunto set her hand and seal, all as of the day and year first hereinabove written.

Two-O-One East Delaware Place Building Corporation, a corporation,
By Howard D. Henry,
Its President.

Attest:

Minnie H. Case,
Secretary

Minnie H. Case

Chicago Title and Trust Company, not Individually
but as Trustee under Trust Deed recorded as
Document 9117122,

By H. M. Arnan,
Its Vice President

Attest:

A. Traeger,
Asst. Secretary

Chicago Title and Trust Company, not Individually
but as Trustee under Trust Deed recorded as
Document 9128500,

E. A. Hackett,
Its Vice President

Attest:

A. Traeger,
Asst. Secretary.

Lawrence Stern & Company, a corporation
By A. E. Mayer
Its Vice President

Attest:

Horner Troner
Secretary."

automatically revert to conform with the provisions in the original trust deeds; and said bonds and trust deeds shall be and remain in full force and effect as if this agreement had never been executed. It is expressly understood, however, that in case of default by the 'Owner', that the 'Second Mortgage Trustee', or the 'Trustee' thereunder, or the authorized first mortgage bondholders, shall have and they are hereby expressly given the right to sue and default of the 'Owner', in order to enforce the provisions of this agreement, in so far as it affects the right of the 'Owner' to the bonds and trust company, as agent for the bondholders first mortgage bondholders to declare this agreement cancelled.

This agreement shall be binding upon and inure to the benefit of all the parties hereto, their respective heirs, assigns, administrators, executors, legal representatives and assigns. It is expressly understood that the extended first mortgage bonds shall bear interest at the rate of 6 per annum during the extended period, and the extended second mortgage bonds shall bear interest at the rate of 8 per annum, and that said interest shall be payable semi-annually at the same time and in the same place as interest on the remaining bonds.

In witness whereof, said Two-One Trust Company, said Building Corporation, Chicago Title and Trust Company, and said Chicago Title and Trust Company, have caused these presents to be executed by their respective officers thereunto duly authorized, and their respective corporate seals to be hereunto affixed, and said Chicago Title and Trust Company, has hereunto set her hand and seal, all as of the day and year first before written.

Two-One Trust Company, a corporation,
By Edward D. Henry,
Its President.

Attest:
Minnie H. Case,
Secretary.

Chicago Title and Trust Company, not individually
but as trustee under trust deed recorded as
Document 211100,
By A. A. Barker,
Its Vice President.

Attest:
A. Barker,
Asst. Secretary.

Chicago Title and Trust Company, not individually
but as trustee under trust deed recorded as
Document 211100,
By A. A. Barker,
Its Vice President.

Attest:
A. Barker,
Asst. Secretary.

Lawrence Stein & Company, a corporation,
By A. E. Meyer,
Its Vice President.

Attest:
Ernest Thonet,
Secretary.

In addition to that agreement the following bill of sale was duly executed by M. H. Case, petitioner herein, to Robert P. Nessler, which reads as follows:

"KNOW ALL MEN BY THESE PRESENTS, that M. H. CASE, of the City of Chicago, in the County of Cook and State of Illinois, party of the first part, for and in consideration of the sum of Ten (\$10.00) Dollars, lawful money of the United States of America, to her in hand paid, at or before the en sealing and delivery of these Presents, by ROBERT P. NESSLER of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and delivered, and, by these Presents, do grant, bargain, sell and deliver, unto the said party of the second part, all the following GOODS, CHATTELS, and PROPERTY, to-wit:

All the goods, chattels and property mentioned and described in the instrument hereto attached and marked Exhibit 'A' and made a part hereof, being all of the furniture, furnishings, fixtures and equipment owned by M. H. CASE and now situated in the premises commonly known as 201 East Delaware Place Building, in Chicago, Illinois. (expressly excluding, however, any of the furniture and furnishings owned by M.H. CASE and now situated in the pent house bungalow)

To have and to hold the said Goods, Chattels and Property unto the said party of the second part, his heirs, executors, administrators and assigns, to and for his own proper use and behoof, forever.

And the said party of the first part does vouch herself to be the true and lawful owner of the said Goods, Chattels and Property, and have in her full power, good right and lawful authority, to dispose of the said Goods, Chattels and Property, in manner as aforesaid: And she does for herself, her heirs, executors and administrators, covenant and agree to and with the said party of the second part, to WARRANT AND DEFEND the said Goods, Chattels and Property to the said party of the second part, his executors, administrators, and assigns, against the lawful claims and demands of all and every person and persons whomsoever.

In Witness Whereof, I have hereunto set my hand and seal the 31st day of May in the year One Thousand Nine Hundred and Thirty-Two.

(Signed) M. H. Case (Seal)

Sealed and delivered in Presence of

(Signed) Gerald M. Schaefer

State of Illinois) ss.

Cook County.)

I Gerald M. Schaefer, a Notary Public, in and for said County, DO HEREBY CERTIFY, that this Instrument was duly acknowledged before me by the above named M. H. CASE, this 31st day of May, A. D. 1932.

(Signed) Gerald M. Schaefer

Notary Public."

On the same date there was also an assignment of rents by said M. H. Case to the said Robert P. Nessler and possession of said furniture was delivered to said Nessler.

Apparently the parties herein operated in accordance with the terms and provisions of the foregoing agreement until 1936, at which time suit was commenced by the trustee for the foreclosure of the trust

In addition to that executed on the following bill of sale was duly executed by M. H. Case, petitioner herein, to Robert A. Wheeler, which reads as follows:

"KNOW ALL MEN BY THESE PRESENTS, that M. H. Case, of the City of Chicago, in the County of Cook and State of Illinois, hereby assigns, transfers, conveys, and in consideration of the sum of Ten Dollars (\$10.00) to the said Robert A. Wheeler, to have in hand paid, at or before the execution and delivery of these presents, by ROBERT A. WHEELER, of the second part, the several and several parts of the second part, has granted, conveyed, sold and delivered, and hereby acknowledged, to grant, bargain, sell and deliver, unto the said party of the second part, all the following goods, chattels, and PROPERTY, to-wit:

All the goods, chattels and property mentioned and described in the instrument hereto attached and marked Exhibit 'A' and made a part hereof, being all of the furniture, furnishings, fixtures and equipment owned by M. H. Case and now situated in the premises commonly known as 301 and Delaware Place Building, in Chicago, Illinois. (expressly excluding, however, any of the furniture and furnishings owned by M. H. Case and now situated in the same house and lot); To have and to hold the said goods, chattels and property unto the said party of the second part, his heirs, assigns, administrators and assigns, to and for his own proper use and benefit, forever.

And the said party of the first part does verily believe to be the true and lawful owner of the said goods, chattels and property, and have in her full power, good right and lawful authority, to dispose of the said goods, chattels and property, in manner as aforesaid; And she does for herself, her heirs, assigns, administrators, covenant and agrees to and with the said party of the second part, to WARRANT AND DEFEND the said goods, chattels and property to the said party of the second part, his heirs, assigns, administrators, and every person and person whose name or names are set forth in the list of day in the year the thousand nine hundred and thirty-two.

In witness whereof, I have hereunto set my hand and seal the 31st day of May in the year the thousand nine hundred and thirty-two.

(Signed) M. H. Case
(Sealed and delivered in presence of)
(Signed) Gerald M. Wheeler

State of Illinois) ss.
Cook County)
I, Gerald M. Wheeler, a Notary Public, in and for said County, DO HEREBY CERTIFY that this instrument was duly acknowledged before me by the above named M. H. Case, this 31st day of May, A. D. 1932.
(Signed) Gerald M. Wheeler
Notary Public.

On the same date there was also an assignment of debts by said M. H. Case to the said Robert A. Wheeler and assignment of said furniture as delivered to said Wheeler.

Apparently the parties herein contracted in accordance with the terms and provisions of the foregoing agreement until 1932, at which time suit was commenced by the trustee for the enforcement of the trust

deed and also asking that the property which had been turned over to Nessler under the agreement herein set forth, be decreed to be subject to the lien of the bondholders, as provided in said agreement.

The written instruments in this case, consisting of four, although executed at different times all relate to the same subject-matter and refer to one another. In order to understand the entire situation, these documents must be considered as if written at the same time.

In the case of Hagerman v. Schulte, 349 Ill. 11, the rule relative to various instruments being considered as one, is set forth at page 20, as follows:

"The rule is familiar that where different instruments are executed as the evidence of one transaction or agreement they are to be read and construed as constituting but a single instrument."

It appears that the extension agreement and the instrument executed pursuant thereto were the result of protective negotiations and, on most occasions, M. H. Case was represented by her brother Charles Henry who was an experienced real estate man. He was president and treasurer of the Owner Corporation and negotiated the first mortgage loan. He continued to be vitally interested in mortgagor's success throughout the negotiations leading up to the extension agreement of May 31, 1932, and stated he was doing everything possible to avoid foreclosure by the secured interests. He advised petitioner to sign the extension agreement and bill of sale in order that her 96% stock interest, as mortgagor, would not be imperiled or wiped out by foreclosure.

It also appears that petitioner, herself, although in the real estate business, relied upon her brother's advice throughout the negotiations and this corporation of which she was the chief stock owner, was represented by an attorney at that time, although she, herself, took an active part in the negotiations.

It is to be noted at this time that the petitioner does not charge fraud, concealment or overreaching, nor does she charge that she was not competent or did not know what she was doing when she signed the extension agreement and bill of sale in May 1932, and does not

and also asking that the property which was then owned by the
Wesley under the agreement remain out of the hands of the
to the lien of the bondholders, as provided in this agreement.

The written instruments in this case, consisting of four,
although executed at different times all relate to the same subject-matter
and refer to one another. In order to understand the entire situation,
these documents must be considered as if written at the same time.

In the case of Wesley v. Wesley, 207 Ill. 31, the rule
relative to various instruments being considered as one, is very clearly
at page 20, as follows:

"The rule is familiar that where different instruments are
executed as the evidence of one transaction or agreement they
are to be read and construed as constituting but a single instru-
ment."

It appears that the extension agreement and the instrument
executed pursuant thereto were the result of protracted negotiations
and, on most occasions, M. E. Case was represented by her brother
Charles Henry who was an experienced real estate man. He was president
and treasurer of the General Association and negotiated the first mortgage
loan. He continued to be vitally interested in the negotiations
throughout the negotiations leading up to the extension agreement of
May 31, 1932, and stated he was doing everything possible to avoid
foreclosure by the second mortgage. He advised witnesses to sign
the extension agreement and bill of sale in order that the first
mortgage, as mortgage, would not be forfeited or wiped out by fore-
closure.

It also appears that occasionally, himself, although in the
real estate business, relied upon her brother's advice throughout the
negotiations and this corporation of which she was the only stock
owner, was represented by an attorney at that time, although she,
herself, took an active part in the negotiations.

It is to be noted at this time that the extension agreement was
executed, concealment or overreaching, now both the extension agreement and
was not competent or did not know what she was doing when she signed
the extension agreement and bill of sale in May 1932, and does not

ask for a rescission of the contract which she made. It appears from the recitals of the extension agreement that petitioner desired to effect a readjustment of the payments required to be made by the mortgagor corporation on its existing mortgages and that the bondholder interests were willing to grant the corporation, of which petitioner was the principal owner, certain extensions as set forth in said agreement.

It further appears that as the owner of certain personal property located in the mortgaged premises, petitioner willingly conveyed her furniture as consideration for the extensions granted to her corporation. We cannot find any provision in the written agreement for the return of the furniture. A significant clause in the extension agreement reads as follows:

"M. H. Case executes this agreement for the purpose of evidencing her agreement to the sale of the personal property, furniture, furnishings and equipment located in the mortgaged premises to Robert P. Neessler as a part of the consideration paid to the parties hereto for the extensions and indulgences herein granted to Two-C-One East Delaware Place Building Corporation.
* * *"

We believe it to be the duty of any court to endeavor to find out what the intention of the parties was when they made and entered into contracts or agreements which are the basis of a law suit. In this connection the agreement provides: "The preambles and recitals of this agreement are expressly made a part of the covenants hereof, and this agreement is to be construed in the light thereof."

In Carson, Pirie, Scott & Co. v. Parrett, 346 Ill. 252, the court at page 259, said:

"It is a cardinal rule of construction of written contracts that the court will look at the entire contract and construe it according to the intention of the parties as the same appears from the language of the instrument."

As we have stated the parties operated under this contract from 1932 until 1936. It is now the contention of the petitioner M. H. Case that there was no bill of sale and that the agreement was not intended to be a conveyance of the property, although nothing appears in the contract upon which to base such an assumption. No provision was made for the return of the property and a consideration of the entire trans-

ask for a provision of the amended order was made. It appears that the results of the extension agreement were not considered in effect a readjustment of the payments provided for by the mortgage corporation on its existing mortgage but that the mortgage interests were willing to grant the corporation, at which time, was the principal owner, certain extensions of the terms in the agreement. It further appears that as the owner of certain mortgaged property located in the mortgage premises, provision was made for the mortgage as consideration for the extension granted to the corporation. We cannot find any provision in the written agreement for the return of the furniture. A stipulation clause in the extension agreement reads as follows:

"W. B. Green procured this agreement for the purpose of obtaining for payment of the sale of the personal property, furniture, furnishings and equipment located in the mortgage premises to Robert J. Hester as a part of the consideration for the parties hereto for the extension and interest therein granted to the Green-Hester Trust mortgage corporation."

We believe it to be the duty of any court to construe to that effect what the intention of the parties was when they made the extension contract or agreement which was the basis of a new sale. In this connection the agreement provided: "The mortgage and results of this agreement are expressly made a part of the mortgage instrument, and this agreement is to be construed as the first contract."

In Green, supra, 1935, 100 S.W.2d 111, 109, 108.

court at page 109, said:

"It is a well-known rule of construction in contract cases that the court will look to the entire contract and construe it according to the intention of the parties at the time it was made. The language of the instrument."

As we have stated our position in Green, supra, 100 S.W.2d 111, 109, 108, 107, 106, 105, 104, 103, 102, 101, 100, 99, 98, 97, 96, 95, 94, 93, 92, 91, 90, 89, 88, 87, 86, 85, 84, 83, 82, 81, 80, 79, 78, 77, 76, 75, 74, 73, 72, 71, 70, 69, 68, 67, 66, 65, 64, 63, 62, 61, 60, 59, 58, 57, 56, 55, 54, 53, 52, 51, 50, 49, 48, 47, 46, 45, 44, 43, 42, 41, 40, 39, 38, 37, 36, 35, 34, 33, 32, 31, 30, 29, 28, 27, 26, 25, 24, 23, 22, 21, 20, 19, 18, 17, 16, 15, 14, 13, 12, 11, 10, 9, 8, 7, 6, 5, 4, 3, 2, 1, 0.

action we believe shows that a complete conveyance was intended.

In Thelin v. Marwitz, 277 Ill. App. 535, this court said at page 542:

"In case of doubt the interpretation which the parties by their acts under the contract have given it will have weight and may be controlling provided the plain terms of the agreement are not overthrown."

The evidence further shows that by the terms of the agreement, the bondholders therein described, by consenting thereto, extended their respective bonds and forbore interest thereon as follows: unsubordinated first mortgage bonds aggregating \$57,000 in principal amount were extended until November 15, 1940; interest at rate of 6% per annum on subordinated first mortgage bonds aggregating \$175,000 in principal amount was forborne, except as earned, and such unpaid interest was to be capitalized as additional principal to become due November 15, 1940; second mortgage bonds aggregating \$110,000 in principal amount were extended until November 15, 1940.

We are of the opinion that the extension agreement which was in fact granted to the corporation, of which petitioner was a 95% owner, was a valuable consideration. Manifestly, it would be a strained construction to say that the bondholders would have agreed to grant extensions and forbearances, unless petitioner had agreed to convey her furniture. The point is made that the \$10 mentioned in the bill of sale as being the consideration therefor, was not paid. We think this quite immaterial in view of the circumstances surrounding the entire transaction. A promise for a promise is a good consideration and will support a contract. Kissack v. Bourke, 224 Ill. 352; Chicago Title and Trust Co. v. Cohen, 284 Ill. App. 181; Wickham v. Hyde Park Building & Loan Assn., 80 Ill. App. 523; Milk Producers Marketing Co. v. Bell, 234 Ill. App. 222.

In Chicago Title and Trust Co. v. Cohen, 284 Ill. App. 181, at page 189 said:

action we believe shows that a complete conveyance was intended.

In Thelin v. Marquette, 77 Ill. App. 2d 505, 231 N.E.2d 111, 112.

542:

"In case of doubt the interpretation which the parties to their act under the contract have given it will prevail and may be controlling provided the plain intent of the instrument was not overthrown."

The evidence further shows that in the terms of the agreement,

the bondholders therein described, by connecting interest, extended each respective bonds and forbore payment thereof as follows: unsecured

first mortgage bonds aggregating \$27,000 in principal amount were

extended until November 15, 1940; interest on each of the bonds was to

subordinated first mortgage bonds aggregating \$75,000 in principal

amount was forbore, except as herein, and then unpaid interest was to

be capitalized as additional principal in second and subsequent 15, 1941;

second mortgage bonds aggregating \$10,000 in principal amount were

extended until November 1, 1940.

It is the opinion that the extension agreement which was in

fact granted to the corporation, of which defendant was a 50% owner,

was a valuable consideration. Briefly, it would be a valuable con-

tribution to say that the bondholders would have agreed to grant

extensions and forbearances, unless defendant had agreed to convey

her furniture. The point is made that the 100 mentioned in the bill as

safe as being the consideration therefor, was not safe as value was

quite limited in view of the defendant's ownership and control

thereof. A promise for a good consideration is a good consideration for a

contract. Illinois v. Board of Trustees, 101 Ill. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In Chicago Title and Trust Co. v. Board of Trustees, 101 Ill. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

" * * * while it is true that merely formal recitals, such as 'for value received,' a 'good and valuable consideration,' or 'the receipt of one dollar in hand paid', are always subject to explanation or denial, these differ from cases where, as here, in preliminary recitals the consideration is described."

In the instant case we think there was ample consideration shown and even though petitioner did not receive the benefit direct to her, as she alleges, that of itself would not constitute want of consideration as it is not indispensable that the consideration bargained for passed directly to her. Any act which is a benefit to one party or a disadvantage to the other constitutes a sufficient consideration to support a contract. Dickinson v. McKay, 177 Ill. App. 412; Farmers National Bank, etc. v. Rosenkraus, 240 Ill. App. 230.

We do not think it is a duty of a court of equity to inquire into the reasonableness or sufficiency of the consideration of a valid contract in the absence of any charge of fraud, mistake or misrepresentation. In Williston on Contracts (Rev. Ed.) Vol. 1, Sec. 115, page 389, states the following:

"It is an 'elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration.' This rule is almost as old as the law of consideration itself. Therefore anything which fulfills the requirements of consideration will support a promise whatever may be the comparative value of the consideration, and of the thing promised."

It is contended by petitioner that the conversation between the parties should be considered in construing the contract. In the case of Armstrong Paint Works v. Can Co., 301 Ill. 102, wherein the construction to be given to a sales contract was involved, the Supreme Court at pages 105 and 106 of its opinion, said:

"In construing a contract it is proper for a court to take into consideration the surrounding circumstances. It should place itself as nearly as it can in the same situation as the parties who made the contract, so that it may view the circumstances as they viewed them and so it may judge the meaning of the words and their application to the things described as the parties judged and applied them. (3 Jones' Com. on Evidence, sec. 453.) But this does not give either party the right to establish a different contract from that expressed in the written agreement. When parties sign a memorandum expressing all the terms essential to a complete agreement they are to be protected against the doubtful veracity of the interested witnesses and the uncertain memory of disinterested witnesses concerning the terms of their agreement, and the only way in which they can be so protected is by holding each of them conclusively bound by the terms of the agreement as expressed in the writing. All conversations and parol agreements between the parties prior to the written agreement are so

While it is true that merely formal promises, such as 'for value received,' a 'good and lawful consideration,' or 'the receipt of one dollar in hand paid,' are always used, yet the receipt or denial, or the explanation or denial, of the consideration is immaterial.

In the instant case we think there was some consideration shown and even though defendant did not receive the benefit thereof, as the alleged, that of itself would not constitute want of consideration as it is not indispensable that the consideration be given directly to her. Any act which is a benefit to one party or a disadvantage to the other constitutes a sufficient consideration to support a contract.

Johnson v. Johnson, 127 Ill. App. 412; Johnson v. Johnson, 140 Ill. App. 230.

We do not think it is a duty of a court to carry its inquiry into the reasonableness or wisdom of the consideration of a contract in the absence of any charge of fraud, mistake or misrepresentation. In Johnson v. Johnson (127 Ill. App. 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"It is an elementary principle that the law will not carry into an inquiry as to the validity of the consideration, the rule is almost as old as the law of contract itself. Therefore anything which fulfills the requirements of consideration will support a promise whatever may be the respective value of the consideration, and of the thing promised.

It is contended by defendant that the consideration between the parties should be considered in construing the contract. In the case of Johnson v. Johnson, 127 Ill. App. 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"In construing a contract it is proper to look to the surrounding circumstances. It would seem almost nearly as if in the same light as the contract is to be construed, so that it may give the effect intended by the parties, and so if any thing is said in the contract which is not in the thing described as the thing to be done, it is to be construed in the light of the thing described as the thing to be done. (3 Jones, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

merged therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement. (3 Jones' Com. on Evidence, sec. 434)."

The master in his report in this case stated: "The various conversations and written instruments all constituted one transaction."

Without pursuing this subject further, we cannot see how this court, or in fact any court, could grant the relief which the petitioner seeks without making what would be equivalent to a new contract between the parties. It appears that petitioner and her brother have been occupying the pent house on the top of this building, for several years without paying any rent therefor. It would be contrary to the principles of equity to permit a party to a contract to accept the favorable provisions contained therein and to reject those which are not considered as favorable to that particular party.

As we have heretofore stated, both parties have proceeded according to the terms of the contract and where all the parts of said contract is dependent one upon the others, the acceptance of the benefits by one, would preclude that party from rejecting the contract in its entire form. Langher v. Glos, 276 Ill. 342; Gridley v. Wood, 305 Ill. 376; Boylan v. Boylan, 349 Ill. 471.

Having disposed of all the questions which have been called to our attention, we do not believe that any serious error was committed by the trial court in the entry of its decree. For the reasons herein given the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

HEBEL, F.J. AND RURKE, J. CONCUR.

erred therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention to rescind the contract. (2 Jones, 100, on Evidence, sec. 444.)

The master in his report in this case stated: "The various

conversations and written statements all considered and examined,

Without pursuing this, the subject further, we cannot see how

this court, or in fact any court, could avoid the result which the

petitioner seeks without saying that would be equivalent to a new contract

between the parties. It appears that petitioner and her father have

been occupying the pent house on the top of this building, for several

years without paying any rent therefor. It would be contrary to the

principles of equity to permit a party in a contract to accept the

favorable provisions contained therein and to reject those which are not

considered as favorable to that particular party.

As we have heretofore stated, both parties have proceeded upon the

ing to the terms of the contract and when all the facts of this contract

is dependent one upon the other, the acceptance of one term is

would preclude that party from rejecting the contract in its entire form.

Lanahan v. Glor, 278 Ill. 248; Quincy v. Glor, 208 Ill. 275; Bayley v.

Bayley, 248 Ill. 471.

Having disposed of all the questions which have been raised

to our attention, we do not believe that any further error has committed

by the trial court in the entry of its decree. For the reasons herein

given the decree of the district court is affirmed.

IT IS SO ORDERED.

WILLIAM J. ANDERSON, J. CLERK.

41248

THE MARINE TRUST COMPANY OF BUFFALO, a corporation,
Executor of the Estate of Julia T.
Sherman, Deceased,

Appellee,

v.

FRANK G. REYNOLDS, MARY J. BOYCE, and
Dickinson Bishop, Successor Trustees Under the
Last Will and Testament of William D. Boyce,
Deceased, et al;

(Defendants).

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

On Appeal of FRANK G. REYNOLDS, MARY J. BOYCE,
and DICKINSON BISHOP, Individually and as
Successor Trustees under the Last Will and
Testament of William D. Boyce, Deceased; HARRY
BOYCE PARKER, SYDNEY BOYCE BISHOP, DICKINSON
BISHOP, JR., EDNA BARRY BOYCE, JANE BOYCE,
VIRGINIA LEE BOYCE STERLING; and JANE ELLEN
PARKER, JOHN WINSLOW BISHOP, MARGARET ANN BISHOP,
MARY BOYCE, WILLIAM DICKSON BOYCE, II, and
OLIVER J. STERLING, Minors; and THE FIRST
NATIONAL BANK OF OTTAWA, as Guardian of the
Estate of William Dickson Boyce, II, and Mary
Boyce, Minors,

Appellants.

308 I.A. 674

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

An opinion has been filed today in Case No. 41247, Appellate
Court, First District of Illinois, which bears the same title as
this case. These cases have been consolidated and the facts in
this case are the same as in Case No. 41247, and the law controlling
in that case is also controlling in this case.

For the reasons as set forth in Case No. 41247 in our
opinion as filed today, the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

THE HANNA TRUST COMPANY, a corporation,
Plaintiff, Executor of the Estate of William
Hanna, Deceased.

vs.

v.

FRANK G. REYNOLDS, MAY J. REYNOLDS, and
Dickinson Bishop, Successors of the Estate of
Last Will and Testament of William J. Hanna,
Deceased, et al;

(Defendants).

On Appeal of FRANK G. REYNOLDS, MAY J. REYNOLDS,
and DICKINSON BISHOP, Individually and as
Successors of the Estate of William J. Hanna,
Testament of William J. Hanna, Deceased; MAY J.
REYNOLDS, DICKINSON BISHOP, et al; DICKINSON
BISHOP, JR., EDNA REYNOLDS, JESSIE REYNOLDS,
VIRGINIA L. BOYCE STEWART, et al; JAMES WILSON
PARKER, JOHN WILSON PARKER, Successors and Assigns
of WILLIAM DICKINSON BOYCE, et al;
OLIVER J. STEWART, Minor; and THE FIRST
NATIONAL BANK OF CHICAGO, as Executor of the
Estate of William Dickson Boyce, II, and Mary
Boyce, Widow.

Respectfully,

80911674

MR. JUSTICE DAISY E. BRADLEY, DELIVERED THE OPINION OF THE COURT.

An opinion has been filed today in Case No. 11674, captioned
Court, First District of Illinois, which bears the case title as
this case. These cases have been consolidated and the facts in
this case are the same as in Case No. 11647, and the law controlling
in that case is also controlling in this case.
For the reasons we set forth in Case No. 11647 in my
opinion as filed today, the decree of the Circuit Court is affirmed.

CHIEF JUSTICE.

RENEE, S. J. AND WIFE, J. DICKINSON.

41415

EDNA IVES,

Appellee and Cross-Complainant,

vs.
HAL G. OTIS and ESTHER SPOONER,

Defendants,

On Appeal of ESTHER SPOONER,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

308 I.A. 675

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

The defendant Esther Spooner brings this appeal from a judgment entered in the Superior Court in favor of plaintiff Edna Ives for \$25,000. The suit was brought to recover for personal injuries alleged to have been sustained by plaintiff while riding as a guest in the automobile of Esther Spooner, which automobile collided with an automobile owned by Giertz Brothers and which was driven by Hal G. Otis. The cause was tried before a judge and jury. Giertz Brothers were found not guilty and Hal G. Otis was dismissed from the suit.

The pleadings charged that Esther Spooner was guilty of wilful and wanton conduct, as follows:

1. Wilfully and wantonly operated the said automobile so that it came in violent contact with the automobile of Hal G. Otis.
2. Wilfully and wantonly drove the automobile at a high, dangerous and excessive speed.
3. Wilfully and wantonly failed to keep a reasonably careful lookout for vehicles approaching said intersection from the north along and upon the highway.
4. Wilfully and wantonly failed to bring the said automobile to a full stop at highway 47.
5. Wilfully and wantonly failed to decrease the speed of said automobile upon approaching said intersection.
6. Wilfully and wantonly failed to heed the said warning sign indicating the presence of the stop sign.

Agencies and Bureau of Investigation

WAL. G. OTIS and others

Defendants

On Appeal of certain motions

Agencies

MR. JUSTICE DENNIS: I shall now deliver the opinion of the court.

The defendant Walter Spencer brings this appeal from a

judgment entered in the Superior Court in favor of plaintiff for \$5,000. The suit was brought to recover for personal injuries alleged to have been sustained by plaintiff while riding as a guest in the automobile of Walter Spencer, which automobile collided with an automobile owned by Walter Spencer and which was driven by Walter G. Otis. The cause was tried before a judge and jury. Verdict for Spencer was returned not guilty and Mr. G. Otis was dismissed from the

suit.

The pleadings charged that Walter Spencer was guilty of

willful and wanton conduct, as follows:

1. Willfully and wantonly operating the said automobile so that it came in violent contact with the automobile of Walter G. Otis.
2. Willfully and wantonly drove the automobile at a high, dangerous and excessive speed.
3. Willfully and wantonly failed to keep a reasonably careful lookout for vehicles approaching with investigation from the highway and upon the highway.
4. Willfully and wantonly failed to bring the said automobile to a full stop at highway 47.
5. Willfully and wantonly failed to observe the laws of said automobile upon approaching said investigation.
6. Willfully and wantonly failed to keep the said automobile sign indicating the presence of the said sign.

7. Wilfully and wantonly failed to yield the right of way to the defendant, Hal G. Otis.

8. Wilfully and wantonly failed to give audible warning of her intention to proceed over said intersection.

9. Wilfully and wantonly drove at a rate of speed greater than was reasonable and proper, having regard to the traffic and the use of the road, etc.

Plaintiff's theory of the case is that the defendant, Esther Spooner, driving her husband's automobile on Route 72 west with plaintiff as a guest, was operating the automobile at a high rate of speed and went through a stop sign at Route 72 which intersects Route 47 at right angles, and that this constituted wilful and wanton conduct and that plaintiff was in the exercise of care for her own safety.

Plaintiff further contends that the verdict of the jury finding the defendant Spooner guilty of wilful and wanton conduct in the operation of her automobile was sustained by the manifest weight of the evidence; that since there were no eye-witnesses to plaintiff's conduct at the time of the accident she was justified in offering evidence of careful habits and that the damages awarded are conservative in amount.

Defendant's theory of the case is that there is no proof that the defendant did not stop at the stop sign, no proof that the defendant was guilty of wilful and wanton conduct, and that if there was wilful and wanton conduct on the part of Esther Spooner there was like conduct on the part of plaintiff.

Three special interrogatories were submitted to the jury, and as to these interrogatories, they found as follows:

1. Edna Ives, the plaintiff, was in the exercise of ordinary care at and prior to the accident.

2. Hal G. Otis, the driver of the defendant Giertz' car, was in the exercise of ordinary care at and prior to the accident.

3. The defendant, Esther Spooner, was guilty of wilful and wanton misconduct that contributed to the injury of the plaintiff.

The defendant Spooner is appealing here from a judgment for \$25,000 rendered against her and the appellee Edna Ives had filed notice of a cross-appeal from the action of the trial court in entering judgment upon the verdict of not guilty as to the defendants Giertz Brothers.

There is no substantial controversy as to the facts in this case. They are practically as follows:

Mrs. Spooner, defendant herein, had arranged to attend a family gathering to be held at Rockford and she had invited Mrs. Ives, the plaintiff, to go with her. Mrs. Ives had never ridden with Mrs. Spooner before and had never been to Rockford over the road upon which they drove that day. When they left Oak Park it was drizzling and the windshield wiper was in operation, but there was only one, which windshield wiper was directly in front of the driver. The window to the right of the passenger was closed and spattered with rain which partially obstructed vision, although Mrs. Spooner testified that she had complete visibility for several blocks.

Route 72, upon which defendant was traveling, runs in a generally east and west direction. At the point of the accident highway 72 intersects highway 47 which runs north and south and 72 runs south at this point and unites with 47 for some distance, finally turning west again, after passing under a viaduct on Route 20.

A blueprint was offered in evidence which had been made by an engineer of the State Highway Department and this gives an idea of the route which the defendant proposed to follow. Mrs. Spooner came along Route 72 from the right, as shown by the blueprint; at Route 47 she was required to stop and turn south; then, after passing under the viaduct, she should have turned acutely west again. The accident occurred where she should have made her first stop and turn, that is at the intersection of Routes 72 and 47. From plaintiff's exhibit 5, being a plat of this territory, it appears that Routes 72 and 47 are each 20 foot concrete highways, and that the pavement widens out in the intersection. As Route 47 approaches Route 72 from the north, it gradually curves from a direction somewhat west of south to one

The defendant Spooner is a resident of the town of ... for \$20,000 rendered against her and the ... notice of a cross-examination from the ... judgment upon the verdict of not guilty ... Brothers. There is no substantial ... case. They are practically as follows:

Mrs. Spooner, defendant herein, did ... family gathering to be held at ... the plaintiff, to go with her. ... Spooner before and had never been to ... they drove that day. When they left ... windshield wiper was in operation, ... windshield wiper was directly in front of ... the right of the passenger was closed and ... partially obstructed vision, although ... had complete visibility for several ...

Route 72, upon which defendant ... Generally east and west direction, ... way 72 intersects highway 7 which runs ... south at this point and unites with ... turning west again, after passing under ... A blueprint was offered in evidence ... an engineer of the State Highway ... of the route which the defendant ... along Route 72 from the right, as shown by ... 47 she was required to stop and ... the plaintiff, she should have ... occurred where she should have ... at the intersection of Route 72 and ... being a part of this territory, it ... each 20 foot concrete highway, and ... the intersection. As Route 72 ...

slightly east of south, although the curve is very gradual.

On the north side of Route 72, and approximately 470 feet east of the east curb of Route 47, is a sign warning westbound traffic on Route 72 of the stop sign and cross road ahead. This sign bears the legend "STOP SIGN AHEAD. JUNCTION 20-47", and it further indicates that Route 72 turns to the left at that point. Close to the edge of the pavement at the intersection is the stop sign. It is the usual octagonal sign and beside it is a direction post showing that westbound traffic on 72 should turn to the left, or south.

Plaintiff's Exhibit 10 is a photograph taken from Route 72, facing in a northwesterly direction, showing Highway 47 as it approached the intersection. This is the view of 47 which Mrs. Spooner had as she drove up toward the corner. There does not appear to be any trees, shrubs or bushes which might obscure the view of the intersecting highway.

As Mrs. Spooner, with her passenger, approached the intersection from the east, Hal Otis, the defendant who was dismissed from the suit, approached the intersection from the north, proceeding in a southerly direction on Route 47. He was driving a Ford coupe. At a point about 400 feet north of the intersection, and on the west side of Route 42, was a sign for southbound traffic reading, "SLO JUNCTION 72". After the accident, but previous to the trial, this sign was taken down, and a stop sign was erected, so that traffic from all directions now has to stop at that corner.

As Mrs. Spooner approached the corner from the east, it is claimed that she was driving at a high rate of speed. There appears to have been only one eye-witness, a Mrs. Catherine Wesemann, the wife of a farmer in the neighborhood, who was going south on Route 47, a little distance north of the intersection. She testified that Otis was about a quarter of a mile ahead of her, traveling at about 45 miles an hour and that the defendant's car was moving at 65 miles an hour.

slightly east of south, although the curve is very gradual.

On the north side of Route 72, and approximately 170 feet

east of the east curb of Route 47, is a sign reading "SCHOOL AHEAD" facing

on Route 72 of the stop sign and cross road ahead. This sign is

the legend "STOP AHEAD, TURNING 25-47", and is further indicated

that Route 72 turns to the left at that point. Close to the

of the pavement at the intersection is the stop sign. It is the

octagonal sign and below it is a circular sign showing that

traffic on 72 should turn to the left, or south.

Plaintiff's Exhibit 13 is a photograph taken from Route 72,

facing in a northwesterly direction, showing Highway 47 as it

the intersection. This is the view of 47 which Mrs. Spooner had when

drove up toward the corner. There does not appear to be any trees,

shrubs or bushes which might obscure the view of the intersecting

way.

As Mrs. Spooner, with her husband, approached the inter-

section from the east, Hal Otto, the defendant who was witness from

the suit, approached the intersection from the north, proceeding in a

southerly direction on Route 47. He was driving a Ford coupe. At a

point about 400 feet north of the intersection, and on the east side

of Route 47, was a sign for southbound traffic reading, "STOP AHEAD

"72". After the accident, but previous to the trial, this sign was

taken down, and a stop sign was erected, so that traffic from all

directions now has to stop at that corner.

As Mrs. Spooner approached the corner from the east, it is

claimed that she was driving at a high rate of speed. There is

to have been only one eye-witness, a Mrs. Lucille Peterson, the

wife of a farmer in the neighborhood, who was going south on Route 47,

a little distance north of the intersection. She testified that Otto

was about a quarter of a mile ahead of her, traveling at about 45

miles an hour and that the defendant's car was moving at 50 miles an

hour.

Criticism of the defendant is leveled at the testimony of Mrs. Catherine Wesemann, as being contradictory. She is the only actual witness and we do not think the fact that she was not quite a quarter of a mile away from the place where the accident occurred, looking across a field, from which point she could plainly see the automobiles, that her testimony should be discredited and we believe it was properly retained for the purpose of proving the allegations of the bill of complaint. We think the analysis of the testimony of the sole witness, as made by the trial court, is correct. That court said:

"The eyewitness was confused, disturbed and excited while on the witness stand. She made contradictory statements with respect to distances, directions, and other matters, but there was nothing to indicate that this was anything more than the common behavior of a simple, limited and inexperienced person placed in a difficult position of a witness in an important case. The jury clearly had a right to accept her testimony, together with corroborating evidence such as the violence of the collision and the fact that both automobiles were thrown considerable distance after the crash."

Such an intelligent analysis is always of value to a reviewing court.

It is further contended by the defendant that there was not sufficient evidence to submit the question of wilful and wanton conduct to the jury. It has never been held in this court that speed is any evidence of wilful and wanton conduct.

In Streeter v. Huarichouse, 357 Ill. 234, the court at page 240, said:

"We cannot agree with the defendant that the speed of the Dodge coupe was the only evidence to support the charge of a willful and wanton injury. We cannot agree that evidence of speed, alone, is insufficient to warrant submitting that question to the jury."

The following cases show that the courts of this State have submitted the question of wilful and wanton conduct in which either speed alone or speed and some other factor was involved. O'Neal v. Gaffarello, 303 Ill. App. 574; Murphy v. King, 284 Ill. App. 74; Heinichen v. Evans, 302 Ill. App. 70; Seiffe v. Seiffe, 267 Ill. App. 23; Foale v. Linsky, 279 Ill. App. 58; Schoenbacher v. Kadetsky, 290 Ill. App. 28; Clark v. Hasselquist, 304 Ill. App. 41; McCarty v. Yates & Co.,

294 Ill. App. 474; Mantonya v. Wilbur Lumber Co., 251 Ill. App. 364, and The People v. Schwartz, 298 Ill. 218.

We believe the defendant Spooner's conduct in driving at the claimed rate of speed, without doing anything to protect her passenger from being injured by a possible collision, was such conduct as would raise the question as to whether or not it was wilful and wanton, and it should be submitted to the jury for its consideration. Brown v. Illinois Terminal Co., 319 Ill. 326; Bremer v. L.E. & W. R. R. Co., 318 Ill. 11; Bernier v. I. C. R. R. Co., 296 Ill. 464; Walldren Express Co. v. Krug, 291 Ill. 472, and Heidenreich v. Brenner, 260 Ill. 439.

Complaint is made by defendant as to the instructions given but we do not find any error was committed in the giving of same.

Complaint is also made that the judgment for \$25,000 entered in favor of plaintiff is excessive. With this we do not agree. Plaintiff was a woman who had nearly reached her 41st birthday, she was injured when a collision occurred between two automobiles at which time she was thrown from defendant's automobile on to a concrete pavement when she lapsed into a coma and was removed to a hospital. She remained in the coma which lasted almost without interruption for 51 days, and which continued thereafter until about the first of September, or a total of over 70 days.

The attending physician who first examined plaintiff, testified that she had frequent severe generalized convulsions; that she was bleeding from both ears and the nose and there was also some blood coming from the mouth; that she showed indications of broken bones, but, owing to her critical condition, nothing could be done for her at that time.

Her brother, Dr. Krafft, testified that he hurried to the hospital and saw plaintiff unconscious, head bandaged, bleeding from the eyes, nose and mouth; that there was no pulse at her wrist, no blood pressure could be recorded; that the left femur was broken and she was under 60 or 70 pounds traction, which had to be released

[illegible]

for a total of over 70 days, and which continued thereafter until about the first of September, remained in the coma which lasted almost without interruption for 41 days when she lapsed into a coma and was removed to a hospital. The time she was thrown from defendant's automobile on to a concrete curb injured when a collision occurred between two automobiles at which time she was a woman who had nearly reached her 41st birthday, and in favor of plaintiff is excessive. With this we do not agree. Plaintiff is also aware that the judgment for \$25,000 entered but we do not find any error was committed in the giving of same. Complaint is made by defendant as to the instructions given.

The attending physician was first advised of the situation, and he stated that he had frequent severe generalized convulsions; that she was bleeding from both ears and the nose and there was also some blood coming from the mouth; that she showed indications of spinal meningitis, but owing to her critical condition, nothing could be done for her at that time.

the was under 60 or 70 pounds weight, which had to be released blood pressure could be recorded; that the left foot, the right and the eyes, nose and mouth; that there was no pulse at the wrist, no hospital and saw plaintiff unconscious, head contused, bleeding from Her brother, W. Kraft, testified that he hurried to the

because of her hemorrhage and shock. Plaintiff was given a heart stimulant, as well as morphine to quiet her convulsions and her respiration dropped to six or seven per minute. She was in such a condition that Dr. Krafft stayed all night for sixteen nights. She was administered glucose and normal salt solution and she could not be moved in bed. Her entire back started to suppurate, and her temperature rose to 105.6 degrees. She lay in ice packs for fourteen days. When her temperature dropped again her convulsions recommenced, and she was given sedatives.

The evidence further shows that on the seventh day plaintiff got a complete paralysis of the left side of the face, and clonic convulsions of her right side and leg, so the nurses or doctor had to hold the leg all night; that the x-rays which were taken later disclosed a complete oblique fracture of the left femur, a fracture of the right fibula, a fracture through the left shoulder blade, extending into the joint, a fracture of the left clavicle, a complete transverse fracture of both rami of the right pubic bone; that she also had a linear fracture of the left temporal bone, involving the medial fossa of the cranial cavity, also another fracture of the skull, involving the base of the anterior fossa.

The evidence further shows that her left leg healed with a shortening of about three inches; that her pelvic girdle also healed in a distorted position; that about three months after the accident, plaintiff began to get around in a wheel chair; that her mental condition began to change; that she became depressed, excitable, offensive and irritable; that she manifested fear to go outside and she developed headaches and dizziness and also menstrual irregularities.

A Dr. Hoffman, a specialist in nervous and mental diseases, examined her and testified that her accident was sufficient to cause her altered mental condition, and that it was permanent. The plaintiff has only partial use of her left hand and arm with some atrophy. She has trouble walking, and ascending and descending stairs.

because of her hemorrhage and shock. Plaintiff was given a blood
stimulant, as well as morphine to quiet her convulsions and her
respiration dropped to six or seven per minute. She was in such a
condition that Dr. Kraft stayed all night for almost nothing. She
was administered glucose and normal salt solution and she could not
be moved in bed. Her entire back started to spasm, and her tem-
perature rose to 105.6 degrees. The day in her room for fourteen
days. When her temperature dropped again her convulsions recommenced,
and she was given sedatives.

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to hold the leg all night; that the x-rays which were taken later
disclosed a complete oblique fracture of the left femur, a fracture
of the right fibula, a fracture through the left shoulder blade,
extending into the joint, a fracture of the left olecranon, a complete
transverse fracture of both ends of the right humerus; that she
also had a linear fracture of the left scapular bone, involving the
medial fossa of the cranial cavity, also another fracture of the skull,
involving the base of the anterior fossa.

The evidence further shows that her left leg healed with
a shortening of about three inches; that her right arm also healed
in a distorted position; that about three months after the accident,
plaintiff began to get around in a wheel chair; that her mental
condition began to change; that she became depressed, excitable,
offensive and irritable; that she manifested fear to go outside and
she developed headaches and dizziness and also mental depression.
Dr. Hoffman, a specialist in nervous and mental diseases,
examined her and testified that her condition was sufficient to make
her altered mental condition, and that it was permanent. The
plaintiff has only partial use of her left arm and her right arm
atrophy. She has trouble walking, and according to her testimony

It is alleged that the expenses which plaintiff incurred as a result of this accident for medical attention, etc., amounted to \$2,832.40, and, because plaintiff's brother is a doctor, he was able to have the charges reduced to that figure, otherwise the expenses would have been considerably more, and it is further alleged that plaintiff's brother made no charge for his services.

We do not believe the amount of the judgment entered by the trial court is excessive in view of the severe and painful injuries which plaintiff sustained as a result of the accident. We must also take into consideration the shock to her nervous system, ~~xxxxxxxixix~~ and her partial disability, which physical disability is permanent.

In considering the cross-appeal which was filed in this case by plaintiff against Hal G. Otis, the driver of the Glertz Brother's automobile, we believe the trial court was justified in finding Glertz Brothers not guilty and that Hal G. Otis should have been dismissed from the suit. We believe the judgment of the trial court entered in favor of plaintiff for \$25,000 and against Esther Spooner, was correct.

For the reasons herein given the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

It is alleged that the expenses which plaintiff incurred as a result of this accident for medical attention, etc., amounted to \$2,832.40, and, because plaintiff's brother is a doctor, he was able to have the charges reduced to that figure, whereas the expenses would have been considerably more, and it is further alleged that plaintiff's brother made no charge for his services.

We do not believe the amount of the judgment entered by the trial court is excessive in view of the severe and painful injuries which plaintiff sustained as a result of the accident. We must also take into consideration the shock to her nervous system, xxxxxxxxxxxx and her partial disability, which physical disability is permanent.

In considering the most-recent which was filed in this case by plaintiff against the City, the effect of the other Brother's automobile, we believe the trial court was justified in finding that Brother's negligence was the proximate cause of the injury and that the City was not negligent. The judgment of the trial court entered in favor of plaintiff for \$10,000 and against the City, was correct.

For the reasons herein given the judgment of the trial court is affirmed.

WITNESS MY HAND AND SEAL OF OFFICE

RENEE, J. J. AND HARRIS, J. J.

41489

RUTH CARLSON,

Plaintiff and Appellant,

v.

CLARENCE O. CARLSON,

Defendant and Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

308 P.A. 675²

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff brings this appeal from a decree entered in the Circuit Court denying plaintiff a divorce from defendant.

Plaintiff's complaint alleged four acts of extreme and repeated cruelty and also alleged that her husband, the defendant, had been adjudged insane; that the dates of the several acts of cruelty occurred prior to the adjudication of insanity.

Defendant was served relative to the proceedings, a guardian ad litem appointed, who appeared and answered, and the cause was heard upon the complaint and answer.

After a hearing, the court dismissed plaintiff's complaint for want of equity on the ground that the defendant, although not adjudicated insane, was actually insane at the time of the commission of the acts complained of, and on the further ground that the acts of cruelty were condoned by the subsequent cohabitation of the parties.

The evidence shows that on August 23, 1929, plaintiff Ruth Carlson was married to Clarence O. Carlson, defendant herein and that they lived together as husband and wife until May 1, 1931, and that on May 2, 1931, the said defendant was declared insane by the County Court of Knox County, Illinois; that defendant was committed to the East Moline State Hospital, where he has since been confined.

Plaintiff testified that her husband did many things which indicated that her husband was not of normal mind; that on April 12, 1930 he went into the basement and cut the water pipes; that defendant had a notion that the two doors were connected with his "boss's" basement and that he could hear the conversation and he might be

WUTH CARLSON,

Plaintiff and Appellant,

v.

CLARENCE O. CARLSON,

Defendant and Respondent.

AGENCY FILE

STANDARD FORM

NO. 100-100000

303 A.A. 675

MR. JUSTICE DENNIS E. HOLMES delivered the opinion of the court.

Plaintiff brings this appeal from a decree entered in the Circuit Court denying plaintiff a divorce from respondent.

Plaintiff's complaint alleged four acts of violence and improper cruelty and also alleged that her husband, the defendant, had been adjudged insane; that the date of the removal order of insanity occurred prior to the adjudication of insanity.

Defendant was served relative to the proceedings, a writ of ad litem appointed, who answered and answered, and the court had heard upon the complaint and answer.

After a hearing, the court dismissed plaintiff's complaint for want of equity on the ground that the defendant, although not adjudged insane, was actually insane at the time of the commission of the acts complained of, and on the further ground that the acts of violence were condoned by the subsequent constitution of the parties.

The evidence shows that on August 2, 1920, plaintiff and defendant were married to Clarence O. Carlson, defendant herein and that they lived together as husband and wife until May 1, 1921, and that on May 2, 1921, the said defendant was committed to the County Court of Knox County, Illinois; that defendant was committed to the East Moline State Hospital, where he has since been confined.

Plaintiff testifies that her husband had many violent fits indicated that her husband was not of normal mind; that on April 15, 1920 he went into the basement and cut the water pipes; that defendant had a notion that the two boys were connected with his "boy's" basement and that he could hear the conversation and he might be

talking about him; that on October 30, 1930, she was cleaning up the living room and two or three cigarettes were on the floor and that she swept them up and put them into the waste basket, when her husband became angry and chased her upstairs, caught her, twisted her arm and threw her on the floor bruising her shoulder; that she showed her sister the marks.

Plaintiff further testified that on May 28, 1930, she felt she could no longer live with defendant, as she was getting afraid; that she went to his office and thought she should drive the car home, but that he drove and went very fast; that he kept turning around all the time thinking someone was chasing them; that he ran into the fence and when they arrived at their home he jumped out of the car and ran into the house.

Plaintiff further testified that defendant was always argumentative and used profane language occasionally; that she had heard that before her husband was married that he was on a roof and fell off and hurt his back; that his occupation was that of a carpenter; that he was always threatening her with different things; that in November, 1930, he slapped her in the face; that one time in April when they were eating dinner he had a milk bottle and every time he would take a drink of milk he would say it would make him laugh and when she told him that was not possible, he slapped her in the face.

Plaintiff further testified that between October, 1930 and May 1, 1931, he struck her at different times; that the last time she lived with him was on the day he was adjudged insane; that he continued to get worse; that he would argue with her, strike and slap her; that he struck her in January and April, 1931; that in November, 1930, he brought a big club into their bedroom, which he explained was to protect them; that he threatened her once with a knife about 10 inches long; that he brought a piece of lead pipe into their bedroom and kept it there for four nights; that she cohabited with him all the time up to a day or so before he was taken away as insane.

The report of the examining physicians which was offered in

talking about him; that on October 20, 1930, she was claiming up the living room and two of three cigarettes were on the floor and that she swept them up and put them into the waste basket, when her husband became angry and chased her upstairs, and that she showed her throw her on the floor bruising her shoulder; that she showed her after the marks.

Plaintiff further testified that on May 12, 1930, she left she could no longer live with defendant, as she was getting afraid; that she went to his office and thought she would live the same home, but that he drove and went very fast; that he kept running around all the time thinking someone was chasing them; that he ran into the house and when they arrived at their home he jumped out of the car and ran into the house.

Plaintiff further testified that defendant was always aggressive and used profane language occasionally; that she had heard that before her husband was married that he was on a fool and fell off and hurt his back; that his occupation was that of a carpenter; that he was always threatening her with different things; that in November, 1930, he slapped her in the face; that one time in April when they were having dinner he had a milk bottle and threw it at her and she was afraid of milk he would say it would hurt his back and when she told him that was not possible, he slapped her in the face.

Plaintiff further testified that between October, 1930 and May 1, 1932, he struck her at different times; that the last time she lived with him was on the day he was adjudged insane; that he continued to get worse; that he would argue with her, strike and slap her; that he struck her in January and April, 1931; that in November, 1930, he brought a big club into their bedroom, which he displayed up to present time; that he threatened her once with a knife about in January, 1931; that he brought a glass of ice into their bedroom and said it there for four nights; that she consulted with all the time as to a day or so before he was taken away as insane.

The report of the medical examination which was offered in

evidence, shows that defendant was suffering from dementia praecox.

The trial court found in favor of defendant on the ground that, although he had not been adjudged insane, that he actually was insane at the time of the commission of the acts complained of, and on the further ground that the alleged acts of cruelty were condoned by subsequent cohabitation by the parties.

In Separate maintenance and divorce cases, the courts have jurisdiction to determine the sanity of defendants involved, without the intervention of a jury.

In considering the question relative to the acts of cruelty alleged, the evidence shows that plaintiff continued to live and cohabit with defendant after the alleged acts of cruelty were committed. It has been held by our Supreme Court in Youngs v. Youngs, 130 Ill. 230, 236, that such action is sufficient to establish condonation of the alleged cruelty and, consequently, is a bar to an action for divorce.

In the instant case plaintiff alleged in her complaint that defendant was insane and set forth such facts that a court could arrive at no other conclusion than that defendant was insane at the time said acts of cruelty are alleged to have been committed.

Plaintiff contends that the defense of condonation and insanity should be set up by special pleas and is an affirmative defense and, consequently, waived such defense by failing to do so. It must be remembered that defendant is an insane person who is a ward of the court and because of his disability he cannot be considered as waiving anything that may be to his benefit. We think the trial court committed no error in this regard. An insane person is not responsible for his actions.

For the reasons herein given we are of the opinion that the decree of the Circuit Court was correct and it is hereby affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

evidence, shows that defendant was suffering from homicidal mania.

The trial court found in favor of defendant on the ground that, although he had not been adjudged insane, that he actually was insane at the time of the commission of the acts complained of, and on the further ground that the alleged acts of cruelty were occasioned by insanity consequent upon the parties.

In separate statements and divorce cases, the courts have held it to be the duty of the courts to determine the sanity of defendant in divorce cases, without the intervention of a jury.

In considering the question relative to the acts of cruelty alleged, the evidence shows that plaintiff continued to live and cohabit with defendant after the alleged acts of cruelty were committed. It has been held by our Supreme Court in Ward v. Ward, 100 Ill. 400, 402, that such action is sufficient to rebut the presumption of the alleged cruelty and, consequently, is a bar to an action for divorce.

In the instant case plaintiff alleged in her complaint that defendant was insane and yet both when I was that a court could decide at no other determination that defendant was insane at the time said acts of cruelty were alleged to have been committed.

Plaintiff contends that the defense of insanity and insanity should be set up by special plea and is an affirmative defense and, consequently, waived such defense by failing to do so. It seems to me remembered that defendant is an insane person who is a ward of the court and because of his insanity he cannot be held responsible for his actions and that may be to his benefit. I think the trial court would be better in this regard. An insane person is not responsible for his actions. For the reasons herein given to me of the reasons that the decree of the Circuit Court was correct and it is hereby affirmed.

WILLIAM H. HARRIS.

WILLIAM H. HARRIS, J. C. HARRIS.

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Unpublished Opinions

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| 4/15/65 | N. J. ... | 37282 |
| 10/1/65 | J. H. ... | 210 |
| 2-16-66 | F. ... | 126-6611 |
| 1-20-67 | R. ... | 22-5847 |
| | L. ... | 263-0133 |
| 10/2/71 | W. ... | FI 6-4724 |
| 10-13 | Shelving Nelson | FI 65506 |
| | C. ... | CL 2133 |
| 2/23/71 | M. ... | FI 6-1492 |
| 2/25/71 | S. B. ... | CL 6-233 |
| 8/19/71 | Tom Shannon | 236-9381 |
| 6/24/71 | R. ... | |
| 8/2/71 | S. W. ... | FR 2 1500 |
| 7-11-72 | King | 1143-696 |
| 10/5/72 | J. ... | CL 6-994 |
| 12/1/72 | M. ... | |
| 12/2/72 | F. ... | 263-1900 |
| 1/17/73 | MORNING | 332-2933 |
| 4/25/73 | Hahn | 929000 |
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